**{In Archive} MTM Time - How about 1:30 or 2:00?**
**Denis Borum** to: Mike_Burke 05/28/2009 12:15 PM

From: Denis Borum/DC/USEPA/US
To: Mike_Burke@cardin.senate.gov,
Archive: This message is being viewed in an archive.

Mike,

I forgot that Jim Wrathall wanted to move up a CWA presentation to Monday at noon, which you will probably want to attend. Does 1:30 or 2:00 work for you for MTM? Jim will also call you about that. Thanks

Denis

Denis R. Borum
Congressional Liaison Specialist
Office of Congressional and Intergovernmental Relations
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC-1301A)
Washington, D.C. 20460
(202) 564-4836 (phone)
(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

**{In Archive} RE: MTM Time - How about 1:30 or 2:00?**
**Burke, Mike (Cardin)** to: Denis Borum 05/28/2009 12:54 PM

From: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA,

History: This message has been replied to.
Archive: This message is being viewed in an archive.

1:30 works fine. Let me know when you confirm.

Mike Burke
Projects Director
Senator Ben Cardin
509 Hart Senate Office Building
Washington, DC 20510
202-224-4524
Mike_burke@Cardin.senate.gov

-----Original Message-----
From: Borum.Denis@epamail.epa.gov [
mailto:Borum.Denis@epamail.epa.gov]
Sent: Thursday, May 28, 2009 12:15 PM
To: Burke, Mike (Cardin)
Subject: MTM Time - How about 1:30 or 2:00?

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Monday at noon, which you will probably want to
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borum.denis@epa.gov (e-mail)

**{In Archive} RE: MTM Time - How about 1:30 or 2:00?**
**Denis Borum** to: Burke, Mike (Cardin) 05/28/2009 02:44 PM

From: Denis Borum/DC/USEPA/US
To: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>,
Archive: This message is being viewed in an archive.

Mike,

1:30 works for us. Where will we meet at?

Denis

Denis R. Borum
Congressional Liaison Specialist
Office of Congressional and Intergovernmental Relations
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC-1301A)
Washington, D.C. 20460
(202) 564-4836 (phone)
(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

"Burke, Mike (Cardin)" 1:30 works fine. Let me know when you con... 05/28/2009 12:54:27 PM

From: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA
Date: 05/28/2009 12:54 PM
Subject: RE: MTM Time - How about 1:30 or 2:00?

---

1:30 works fine. Let me know when you confirm.

Mike Burke
Projects Director
Senator Ben Cardin
509 Hart Senate Office Building
Washington, DC 20510
202-224-4524
Mike_burke@Cardin.senate.gov

-----Original Message-----
From: Borum.Denis@epamail.epa.gov [mailto:Borum.Denis@epamail.epa.gov]
Sent: Thursday, May 28, 2009 12:15 PM
To: Burke, Mike (Cardin)
Subject: MTM Time - How about 1:30 or 2:00?

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(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

## {In Archive} Re: MTM Time - How about 1:30 or 2:00?

**Burke, Mike (Cardin)** to: Denis Borum 05/28/2009 02:59 PM

From: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA,

History: This message has been replied to.
Archive: This message is being viewed in an archive.

Sen Cardin's office - 509 Hart.

---
Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Borum.Denis@epamail.epa.gov
<Borum.Denis@epamail.epa.gov>
To: Burke, Mike (Cardin)
Sent: Thu May 28 14:44:26 2009
Subject: RE: MTM Time - How about 1:30 or 2:00?

Mike,

1:30 works for us. Where will we meet at?

Denis

Denis R. Borum
Congressional Liaison Specialist
Office of Congressional and Intergovernmental Relations
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC-1301A)
Washington, D.C. 20460
(202) 564-4836 (phone)
(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

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|"Burke, Mike (Cardin)"
<Mike_Burke@cardin.senate.gov>
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| To: |
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  |Denis Borum/DC/USEPA/US@EPA
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| Date:      |
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  |05/28/2009 12:54 PM
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| Subject:   |
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Mike Burke
Projects Director
Senator Ben Cardin
509 Hart Senate Office Building
Washington, DC 20510
202-224-4524
Mike_burke@Cardin.senate.gov

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From: Borum.Denis@epamail.epa.gov
[.mailto:Borum.Denis@epamail.epa.gov]
Sent: Thursday, May 28, 2009 12:15 PM
To: Burke, Mike (Cardin)
Subject: MTM Time - How about 1:30 or 2:00?

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borum.denis@epa.gov (e-mail)

**{In Archive} Re: MTM Time - How about 1:30 or 2:00?**
**Denis Borum** to: Burke, Mike (Cardin) 05/28/2009 03:27 PM

From: Denis Borum/DC/USEPA/US
To: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>,

Archive: This message is being viewed in an archive.

Thanks Mike.

"Burke, Mike (Cardin)" Sen Cardin's office - 509 Hart. ---------... 05/28/2009 02:59:59 PM

From: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA
Date: 05/28/2009 02:59 PM
Subject: Re: MTM Time - How about 1:30 or 2:00?

Sen Cardin's office - 509 Hart.

---
Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Borum.Denis@epamail.epa.gov <Borum.Denis@epamail.epa.gov>
To: Burke, Mike (Cardin)
Sent: Thu May 28 14:44:26 2009
Subject: RE: MTM Time - How about 1:30 or 2:00?

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| From: |
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|"Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>
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| To:        |
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  |Denis Borum/DC/USEPA/US@EPA
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| Date:      |
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  |05/28/2009 12:54 PM
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| Subject:   |
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Mike Burke
Projects Director
Senator Ben Cardin
509 Hart Senate Office Building
Washington, DC 20510
202-224-4524
Mike_burke@Cardin.senate.gov

-----Original Message-----
From: Borum.Denis@epamail.epa.gov [.mailto:Borum.Denis@epamail.epa.gov]
Sent: Thursday, May 28, 2009 12:15 PM
To: Burke, Mike (Cardin)
Subject: MTM Time - How about 1:30 or 2:00?

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Washington, D.C. 20460
(202) 564-4836 (phone)
(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

**{In Archive} Re: MTM Briefing**
**Denis Borum** to: Burke, Mike (Cardin) 05/30/2009 12:24 PM

From: Denis Borum/DC/USEPA/US
To: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>,
Archive: This message is being viewed in an archive.

Mike,

Somewhat to my surprise, everyone wants to attend from here (well, it is a hot topic). We'll have a crew of eight. I wanted to let you know right away to improve the chances of there being an available, large enough room.

Denis

Denis R. Borum
Congressional Liaison Specialist
Office of Congressional and Intergovernmental Relations
U.S. Environmental Protection Agency
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Washington, D.C. 20460
(202) 564-4836 (phone)
(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

**{In Archive} Re: MTM Briefing**
**Burke, Mike (Cardin)** to: Denis Borum 05/30/2009 01:18 PM

From: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA,

History: This message has been forwarded.
Archive: This message is being viewed in an archive.

I can't possibly handle that many. You'll need to cut it to 5 max, with 1 from congressional. Okay?
---
Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Borum.Denis@epamail.epa.gov <Borum.Denis@epamail.epa.gov>
To: Burke, Mike (Cardin)
Sent: Sat May 30 12:24:23 2009
Subject: Re: MTM Briefing

Mike,

Somewhat to my surprise, everyone wants to attend from here (well, it is a hot topic). We'll have a crew of eight. I wanted to let you know right away to improve the chances of there being an available, large enough room.

Denis

Denis R. Borum
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(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

## {In Archive} RE: MTM Time - How about 1:30 or 2:00?

**Burke, Mike (Cardin)** to: Denis Borum, Arvin Ganesan, Linda Miller 06/19/2009 11:36 AM

Cc: John Pomponio, William Early

From: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>

To: Denis Borum/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Linda Miller/R3/USEPA/US@EPA,

Cc: John Pomponio/R3/USEPA/US@EPA, William Early/R3/USEPA/US

Archive: This message is being viewed in an archive.

1 attachment

John Pomponio Invite.pdf

Denis -
This was sent by the full committee last night.

Mike

Mike Burke
Projects Director
Senator Ben Cardin
509 Hart Senate Office Building
Washington, DC 20510
202-224-4524
Mike_burke@Cardin.senate.gov

-----Original Message-----
From: Borum.Denis@epamail.epa.gov [
mailto:Borum.Denis@epamail.epa.gov]
Sent: Thursday, May 28, 2009 12:15 PM
To: Burke, Mike (Cardin)
Subject: MTM Time - How about 1:30 or 2:00?

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(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

June 18, 2009

John Pomponio
Director of Environmental Assessment and Innovation Division (EAID)
Region Three
United States Environmental Protection Agency
1650 Arch St.
Philadelphia, PA 19103-2029

Dear Mr. Pomponio:

On behalf of the Senate Committee on Environment and Public Works, we invite you to testify before the Subcommittee on Water and Wildlife at a hearing entitled, "The Impacts of Mountaintop Removal Coal Mining on Water Quality in Appalachia." The hearing will be held on Thursday, June 25, 2009, beginning at 3:30 p.m. in room 406 of the Dirksen Senate Office Building. The purpose of this hearing is to examine the impact of mountaintop removal coal mining on surface and groundwater resources and other indirect impacts in Appalachia.

In order to maximize the opportunity to discuss this matter with you and other witnesses, we are asking that your oral testimony be limited to five minutes. Your written testimony can be comprehensive and will be included in the printed record of the hearing in its entirety, together with any other materials you would like to submit.

To comply with Committee rules, please provide 100 double sided copies of your testimony at least 48 hours in advance of the hearing to the Committee at the following address: 410 Dirksen Senate Office Building, Washington, D.C. 20510-6175. To ensure timely delivery, the copies of testimony must be hand delivered to 410 Dirksen. Packages sent through FedEx, U.S. Mail, or overnight delivery services will be subject to offsite security measures that will delay delivery. Please also email a copy of your testimony (in both MS Word and as a PDF file) to the attention of Anne Collesano, Anne_Collesano@epw.senate.gov at least 48 hours in advance. This email address will be used later to quickly finalize hearing transcripts.

If you plan to use or refer to any charts, graphs, diagrams, photos, maps, or other exhibits in your testimony, please deliver or send one identical copy of such material(s), as well as 100 reduced (8.5" x 11") copies to the Committee, attention of Anne Collesano, Anne_Collesano@epw.senate.gov, at the above address at least 48 hours in advance of the hearing. Exhibits or other materials that are not provided to the Committee by this time cannot be used for the purpose of presenting testimony.

If you have any questions or comments, please feel free to contact Jason Albritton of the Committee's Majority staff at 202.224.8832, Matthew Hite of the Committee's Minority staff at 202.224.6176, Mike Burke of Senator Cardin's staff at 202.224.4524, or Luke Tomanelli of Senator Crapo's staff at 202.224.6142.

Sincerely,

Ben Cardin

Benjamin Cardin
Chairman
Subcommittee on Water and Wildlife

Mike Crapo

Mike Crapo
Ranking Member
Subcommittee on Water and Wildlife

{In Archive} Re: where's Pomponio's testimony???????
Burke, Mike (Cardin)
to:
Denis Borum, Arvin Ganesan
06/24/2009 06:51 PM
Cc:
"Klein, Josh (Cardin)"
Hide Details
From: "Burke, Mike (Cardin)" <Mike_Burke@cardin.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA,

Cc: "Klein, Josh (Cardin)" <Josh_Klein@cardin.senate.gov>
Archive: This message is being viewed in an archive.

You are starting to look incompetent.

---
Sent from my BlackBerry Wireless Handheld

---

**From**: Burke, Mike (Cardin)
**To**: 'Borum.Denis@epamail.epa.gov' <Borum.Denis@epamail.epa.gov>; 'Ganesan.Arvin@epamail.epa.gov' <Ganesan.Arvin@epamail.epa.gov>
**Sent**: Wed Jun 24 16:31:22 2009
**Subject**: where's Pomponio's testimony???????

It was due more than 24 hours ago.

Mike Burke
Projects Director
Senator Ben Cardin
509 Hart Senate Office Building
Washington, DC 20510
202-224-4524
Mike_burke@Cardin.senate.gov

{In Archive} RE: follow-up on EPA briefing
Swager, Curtis (Alexander)
to:
Denis Borum
06/01/2009 05:34 PM
Hide Details
From: "Swager, Curtis (Alexander)" <Curtis_Swager@alexander.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA,
History: This message has been replied to.
Archive: This message is being viewed in an archive.

Denis,

Could you give me the best contact info for the two gentlemen from EPA that spoke at today's(June 1) Clean Water Act briefing for the EPW? Specifically, I am seeking clarification on an answer given regarding man-made ditches and the 1988 clarification.

I appreciate your help on this.

Thanks, Curtis

Curtis Swager
U.S. Senator Lamar Alexander
Dirksen RM 455
(202)-224-4944

**{In Archive} RE: follow-up on EPA briefing**
**Denis Borum** to: Swager, Curtis (Alexander) 06/02/2009 03:43 PM

From: Denis Borum/DC/USEPA/US
To: "Swager, Curtis (Alexander)" <Curtis_Swager@alexander.senate.gov>,
Archive: This message is being viewed in an archive.

Curtis,

Attached is an FR Notice from November 1986. Please see page 41217, bottom of the left hand column. It indicates that non-tidal drainage and irrigation ditches excavated out of uplands are generally not waters of the U.S. EPA further clarified in the EPA/Army Corps "post-*Rapanos*" guidance that this language means that ditches that drain other waters of the U.S. or connect to waters of the U.S.are generally jurisdictional.

Hope this helps.

Denis

51FR41205-34.pdf

Denis R. Borum
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Office of Congressional and Intergovernmental Relations
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(202) 501-1549 (fax)
borum.denis@epa.gov (e-mail)

Federal Register

Thursday
November 13, 1986

Part II

# Department of Defense

Corps of Engineers, Department of the Army

33 CFR Parts 320 through 330

Regulatory Programs of the Corps of Engineers; Final Rule

**DEPARTMENT OF DEFENSE**

**Corps of Engineers, Department of the Army**

**33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330**

**Final Rule for Regulatory Programs of the Corps of Engineers**

**AGENCY:** Corps of Engineers, Army Department, DOD.

**ACTION:** Final rule.

**SUMMARY:** We are hereby issuing final regulations for the regulatory program of the Corps of Engineers. These regulations consolidate earlier final, interim final, and certain proposed regulations along with numerous changes resulting from the consideration of the public comments received. The major changes include modifications that provide for more efficient and effective management of the decision-making processes, clarifications and modifications of the enforcement procedures, modifications to the nationwide permit program, revision of the permit form, and implementation of special procedures for artificial reefs as required by the National Fishing Enhancement Act of 1984.

**EFFECTIVE DATE:** January 12, 1987.

**FOR FURTHER INFORMATION CONTACT:** Mr. Sam Collinson or Mr. Bernie Goode, HQDA (DAEN–CWO–N), Washington, DC 20314–1000, (202) 272–0199.

**SUPPLEMENTARY INFORMATION:**

**Consolidation of Corps Permit Regulations**

These final regulations consolidate and complete the six following rulemaking events affecting the Corps regulatory program:

1. *Interim Final Regulations.* These regulations contained Parts 320–330 and were published (47 FR 31794) on July 22, 1982, to incorporate policy and procedural changes resulting from legislative, judicial, and administrative actions that had occurred since the previous final regulations had been published in 1977. Because it had been almost two years since we had proposed changes to the 1977 regulations, we published the 1982 regulations as "interim final" and asked for public comments. We received nearly 200 comments.

2. *Proposed Regulatory Reform Regulations.* On May 12, 1983, we published (48 FR 21466) proposed revisions to the interim final regulations to implement the May 7, 1982, directives of the Presidential Task Force on Regulatory Relief. The Task Force directed the Army to reduce uncertainty and delay, give the states more authority and responsibility, reduce conflicting and overlapping policies, expand the use of general permits, and redefine and clarify the scope of the permit program. Since these regulations proposed changes to our existing nationwide permits and the addition of two new nationwide permits, a public hearing was held in Washington, DC, on October 12, 1983, to obtain comments on these proposed changes. As a result of the public comments received, nearly 500 in response to the proposed regulations and 22 at the public hearing, we have determined that some of the proposed revisions should be adopted and some should not. We have adopted some of the provisions that were designed to clarify policies for evaluating permit applications, to revise certain permit processing procedures, to add additional conditions to existing nationwide permits, and to modify certain nationwide permit procedures. We have not adopted some of the other proposed changes, including the two proposed new nationwide permits.

3. *Settlement Agreement Final Regulations.* On October 5, 1984, we published (49 FR 39478) final regulations to implement a settlement agreement reached in a suit filed by 16 environmental organizations in December of 1982 against the Department of the Army and the Environmental Protection Agency (*NWF v. Marsh*) concerning several provisions of the July 22, 1982, interim final regulations. The court approved the settlement agreement on February 10, 1984, and on March 29, 1984, we published (49 FR 12660) the implementing proposed regulations. We received over 150 comments on these proposed regulations covering a full range of views. Those comments which were applicable to the provisions of the March 29, 1984, proposals were considered and addressed in the final regulations published on October 5, 1984. The remaining comments have been considered in the development of the final regulations we are issuing today.

In the October 5, 1984, final rule there were several new provisions relating to the 404(b)(1) guidelines. In 33 CFR 320.4(a)(1) we clarified the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines.

If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. In 33 CFR 323.6(a) we stated that district engineers will deny permits for discharges which fail to comply with the 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to section 404(b)(2) of the Clean Water Act. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to issuance), the 404(b)(1) evaluation is conducted simultaneously with the public interest review set forth in 33 CFR 320.4(a).

4. *Proposed Permit Form Regulations.* On May 23, 1985, we published (50 FR 21311) proposed revisions to 33 CFR Part 325 (Appendix A), which contains the standard permit form used for the issuance of Corps permits and the related provisions concerning special conditions. This proposal provided for the complete revision of the permit form and its related provisions to make them easier for permittees to understand. General permit conditions were written in plain English and greatly reduced in number; unnecessary material was deleted; and material which is informational in nature was reformatted under a "FURTHER INFORMATION" heading. We received 18 comments on this proposal.

5. *Proposed Regulations to Implement the National Fishing Enhancement Act of 1984 (NFEA).* On July 26, 1985, we published (50 FR 30479) proposed regulations to implement a portion of the Corps regulatory responsibilities pursuant to the NFEA. Specialized procedures relative to the processing of Corps permits for artificial reefs were proposed for inclusion in Parts 322 and 325. Eight organizations commented on these proposed regulations. The NFEA also authorizes the Secretary of the Army to assess a civil penalty on any person who, after notice and an opportunity for a hearing, is found to have violated any provision of a permit issued for an artificial reef. Procedures for implementing such civil penalties will be proposed at a later date. In addition, we are hereby notifying potential applicants for artificial reef permits that the procedures contained in Part 323 relating to the discharge of dredged or fill materials and those in Part 324 relating to the transportation of dredged material for the purpose of dumping in ocean waters will be used in the processing of artificial reef permits when applicable.

6. *Proposed Regulations (Portion of Part 323 and All of Part 326.* On March 20, 1986, we published (51 FR 9691) a proposed change to 33 CFR 323.2(d), previously 323.2(j), to reflect the Army's policy regarding *de minimis* or incidental soil movements occurring

during normal dredging operations and a proposed, complete revision of the Corps of Engineers enforcement procedures (33 CFR Part 326). Seventeen comment letters were received on these proposed regulations. These comments and the resulting changes reflected in the final regulations for § 323.2(d) and Part 326 are discussed in detail below.

**Environmental Documentation**

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Appropriate environmental documentation has been prepared for all permit decisions. Environmental assessments for each of the nationwide permits previously issued or being modified today are available from the Corps of Engineers. You may obtain these assessments by writing to the address listed in this preamble. Considering the potential impacts, we have determined that none required an environmental impact statement.

**Discussion of Public Comments and Changes**

*Part 320—General Regulatory Policies*

*Section 320.1(a)(6):* In order to provide clarity to the public, we have added a provision to codify existing practice that when a district engineer makes certain determinations under these regulations, the public can rely on that determination as a Corps final agency action.

*Section 320.3(o):* The National Fishing Enchancement Act of 1984 has been added to the list of related laws in § 320.3.

*Section 320.4:* In the May 12, 1983, proposed rule and the March 29, 1984, proposed rule we proposed changes to §§ 320.4(a)(1)—public interest review, 320.4(b)(5)—effect on wetlands, 320.4(c)—fish and wildlife, 320.4(g)—consideration of property ownership, and 320.4(j)—other Federal, state or local requirements. Changes to these paragraphs were adopted in the October 5, 1984, final rule. The various comments relating to these proposals have been fully discussed in the October 5, 1984 final rule (49 FR 39478).

*Section 320.4(a)(3):* Many commenters objected, some strongly, to the deletion in the October 5, 1984, final regulations of the term "great weight" from § 320.4(c), the paragraph concerning the consideration of opinions expressed by fish and wildlife agencies. Many stated that fish and wildlife agencies had the expertise and knowledge to know the impact of work in wetlands; therefore, their opinions should be given strong consideration. Some commenters supported removal of the "great weight" statement expecting less value would be given fish and wildlife agency views. It is not our intention to reduce or discount the value or expertise of fish and wildlife agency comments or those of any other experts in any field. Comments also varied from support of to objection to the deletion of the "great weight" statement from the other policy statements such as energy and navigation in § 320.4. Therefore, we added a new paragraph (a)(3) to clarify our position on how we consider comments from the public, including those from persons or agencies with special expertise on particular factors in the public interest review.

*Section 320.4(b)(1):* One commenter objected to the placement of the word "some" in this paragraph as a rewrite of E.O. 11990 which places no qualifier on "wetlands" indicating that all wetlands are vital. We have found through experience in administering the Section 404 permit program that wetlands vary in value. While some are vital areas, others have very little value; however, most are important. We recognize that "some wetlands are vital . . ." is being read by some people as "Some wetlands are important . . ." This was not our intent. To avoid this confusion we have revised this paragraph by deleting "some wetlands are vital areas . . ." and indicating that "most" wetlands are important.

*Section 320.4(b)(2)(vi):* We have included in the list of important wetlands those wetlands that are ground water discharge areas that, maintain minimum baseflows important to aquatic resources. Scientific research now indicates that wetlands more often serve as discharge areas than recharge areas. Those discharge areas which are necessary to maintain a minimum baseflow necessary for the continued existence of aquatic plants and animals are recognized as important.

*Section 320.4(b)(2)(viii):* We have included in the list of important wetlands those which are unique in nature or scarce in quantity to the region or local area.

*Section 320.4(d):* We have revised this paragraph to clarify that impacts from both point source and non-point source pollution are considered in the Corps public interest review. However, section 208 of the Clean Water Act provides for control of non-point sources of pollution by the states.

*Section 320.4(j)(1):* Clarifying language has been added to this section to eliminate confusion regarding denial procedures when another Federal, state, and/or local authorization or certification has been denied.

*Section 320.4(p):* Some commenters felt that environmental considerations should take precedence over other factors. Other commenters believed that guidance should be given as to who determines whether there are environmental benefits to a project. Many commenters indicated that the regulation does not define the possible range of environmental benefits that will be considered. Environmental benefits are determined by the district engineer and the district staff based on responses received from the general public, special interest groups, other government agencies and staff evaluation of the proposed activity. Defining the possible range of environmental benefits would be almost impossible to cover in the rules in sufficient detail, since circumstances vary considerably for each permit application. After considering all the comments we have decided to make the change as proposed on May 12, 1983.

*Section 320.4(q):* Some commenters believed that this rule would distort review criteria by inserting inappropriate economic assumptions and minimizing environmental criteria. Some commenters suggested that the Corps revise this paragraph to include a provision to challenge an applicant's economic data and that of governmental agencies as well. Other commenters believe that economic factors do not belong in these regulations since the intent of the Clean Water Act is: "to restore and maintain the chemical, physical, and biological integrity of the nation's waters"; therefore, any regulation under the CWA should have, as its primary objective, provisions which give environmental factors the greatest weight. They were concerned that this part may be applied to allow economic benefits to offset negative environmental effects. Some commenters, however, believed that the Corps should assume that projects proposed by state and local governmental interests and private industry are economically viable and are needed in the marketplace. They also believed that the Corps and other governmental agencies should not engage in detailed economic evaluations. Economics has been included in the Corps list of public interest factors since 1970. However, there has never been a specific policy on economics in the regulations. The Corps generally accepts an applicant's determination that a proposed activity is needed and will be economically viable, but makes its own decision on whether

a project should occur in waters of the U.S. The district engineer may determine that the impacts of a proposed project on the public interest may require more than a cursory evaluation of the need for the project. The depth of the evaluation would depend on the significance of the impacts and in unusual circumstances could include an independent economic analysis. The Corps will balance the economic need for a project along with other factors of the public interest. Accordingly, § 320.4(q) has been modified from the proposed rule to provide that the district engineer may make an independent review of the need for a project from the perspective of the public interest.

*Section 320.4(r):* Many comments were offered as to the intent, scope and implementation of the proposed mitigation policy. Comments were almost equally divided between those who felt that the policy should be expanded and those that felt it should be more limited. The issues that were raised include: mitigation should not be used to outweigh negative public interest factors; mitigation should not be integrated into the public interest review; mitigation should be on-site to the maximum extent practicable; off-site mitigation extends the range of concerns beyond those required by Section 404. A wide range of views were expressed on our proposed mitigation policy, but virtually all commenters expressed need for a policy. The Corps has been requiring mitigation as permit conditions for many years based on our regulations and the 404(b)(1) guidelines. Because of the apparent confusion on this matter, we have decided to clarify our existing policy at 320.4(r).

The concept of "mitigation" is many-faceted, as reflected in the definition provided in the Council on (Environmental Quality (CEQ) NEPA regulations at 40 CFR 1508.20. Viewing "mitigation" in its broadest sense, practically any permit condition or best management practice designed to avoid or reduce adverse effects could be considered "mitigation." Mitigation considerations occur throughout the permit application review process and are conducted in consultation with state and Federal agencies responsible for fish and wildlife resources. District engineers will normally discuss modifications to minimize project impacts with applicants at pre-application meetings (held for large and potentially controversial projects) and during the processing of applications. As a result of these discussions, district engineers may condition permits to require minor project modifications, even though that project may satisfy all legal requirements and the public interest review test without those modifications.

For applications involving Section 404 authority, mitigation considerations are required as part of the Section 404(b)(1) guidelines analysis; permit conditions requiring mitigation must be added when necessary to ensure that a project complies with the guidelines. To emphasize this, we have included a footnote to § 320.4(r) regarding mitigation requirements for Section 404, Clean Water Act, permit actions. Some types of mitigation measures are enumerated in Subpart H of the guidelines. Other laws such as the Endangered Species Act may also lead to mitigation requirements in order to ensure that the proposal complies with the law. In addition to the mitigation developed in preapplication consultations and through application of the 404(b)(1) guidelines and other laws, these regulations provide for further mitigation should the public interest review so indicate.

One form of mitigation is "compensatory mitigation," defined at 40 CFR 1508.20(e) to mean "compensating for the impact by replacing or providing substitute resources or environments." Federal and state natural resource agencies sometimes ask the Corps to require permit applicants to compensate for wetlands to be destroyed by permitted activities. Such compensatory mitigation might be provided by constructing or enhancing a wetland; by dedicating wetland acreage for public use; or by contributing to the construction, enhancement, acquisition or preservation of such "mitigation lands." Compensatory mitigation of this type is often referred to as "off-site" mitigation. However, it can be provided either on-site or off-site. Such mitigation can be required by permit conditions only in compliance with 33 CFR 325.4, and specifically with 33 CFR 325.4(a)(3). In addition to those restrictions, the Corps has for many years declined to use, and does now decline to use, the public interest review to require permit applicants to provide compensatory mitigation unless that mitigation is required to ensure that an applicant's proposed activity is not contrary to the public interest. If an applicant refuses to provide compensatory mitigation which the district engineer determines to be necessary to ensure that the proposed activity is not contrary to the public interest, the permit must be denied. If an applicant voluntarily offers to provide compensatory mitigation in excess of the amount needed to find that the project is not contrary to the public interest, the district engineer can incorporate a permit condition to implement that mitigation at the applicant's request.

*Part 321—Permits for Dams and Dikes in Navigable Waters of the United States*

The Secretary of the Army delegated his authority under Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 to the Assistant Secretary of the Army (Civil Works). The Assistant Secretary in turn delegated his authority under Section 9 for structures in intrastate navigable waters of the United States to the Chief of Engineers and his authorized representative. District engineers have been authorized in 33 CFR 325.8 to issue or deny permits for dams or dikes in intrastate navigable waters of the United States" under Section 9 of the Rivers and Harbors Act of 1899. This section of the regulation and §§ 325.5(d) and 325.8(a) have been revised to reflect this delegation.

*Part 322—Permits for Structures or Work in or Affecting Navigable Waters of the United States*

*Section 322.2(a):* We have revised the term "navigable waters of the United States" to reference 33 CFR Part 329 since it and all other terms relating to the geographic scope of the Section 10 program are defined at 33 CFR Part 329.

*Section 322.2(b):* Commenters on the definition of structures indicated that several terms needed further amplification. It was suggested that the term "boom" be defined to exclude a float boom, as would be used in front of a spillway. The term was not redefined because those dams constructed in Section 10 waters do require a permit for a float boom. However, most dams in the United States are constructed in non-Section 10 waters and do not require a permit for a boom (floating or otherwise) unless it involves the discharge of dredged or fill material. It was suggested that the term "obstacle or obstruction" be modified to reinstitute the language from the July 19, 1977, final regulations. We have adopted the suggestion which will clarify our intent that obstacles or obstructions, whether permanent or not, do require a permit; it will also assist in jurisdictional decisions on enforcement. It was suggested that "boat docks" and "boat ramps" be included in the list of structures, since these are frequently proposed structures. These have been included. It was suggested that the term "artificial gravel island" be added, as

Congress, by Section 4(e) of the Outer Continental Shelf Lands Act of 1953, extended the regulatory program to the Outer Continental Shelf, and specifically cited artificial islands as falling under Section 10 jurisdiction. This type of structure is also constructed on state lands within the territorial seas. Accordingly, artificial islands have been included.

*Section 322.2(c):* Two commenters discussed the definition of "work"; one stated that it was too broad and the other that it should be expanded. The present definition of the term "work" has remained unchanged for many years and has achieved general acceptance by the regulators and those requiring a permit. The present language has been retained.

*Sections 322.2(f)(2) and 323.2(n)(2):* Both of these sections are concerned with the definition of general permits. Several commenters expressed support for the additional criteria contained in the May 12, 1983 proposed rule. Other commenters expressed concern that the proposed criteria were illegal. Some commenters believed that the proposal would amount to a delegation of the Section 404 program to the states, and that this is not a prerogative of the Corps of Engineers. Many commenters expressed serious concern that state programs were not comprehensive enough to properly represent the public interest review. Still others objected to the proposal because there were no assurances that the state approved projects themselves were "similar in nature" or would have "minimal adverse environmental effects"; those objections extended to the proposal to assess the impacts of the differences in the State/Corps decisions. Some commenters suggested that an automatic "kick-out" provision, whereby concerned agencies could cause the Corps to require an individual application on a case-by-case basis, may provide sufficient safeguards for the proposal to go forward. Some commenters suggested that a preferred approach to reducing duplication would be for the Corps to express, in its regulations, direction for its districts to vigorously pursue joint processing, permit consolidation, pre-application consultation, joint applications, joint public notices and special area management planning. This change was proposed in 1983. At that time we believed that additional flexibility in the types of general permits which could be developed was necessary to effectively administer the regulatory program. Our experience since then has shown that the existing definitions of general permit at both of these sections is flexible enough to develop satisfactory general permits. Therefore we have decided not to adopt this proposed change. Because several definitions previously found in Part 323 have been moved to Part 328, § 323.2(n) has been redesignated § 323.2(h).

*Section 322.2(g):* This section adds the definition of the term "artificial reefs" from the National Fishing Enhancement Act and clarifies what activities or structures the term does not include. Two commenters suggested modifications, or clarifications, to this definition to ensure that old oil and gas production platforms can be considered for use as artificial reefs. We agree with their suggestion. The definition would include the use of some production platforms, either abandoned in place or relocated, as artificial reefs as long as they are evaluated and permitted as meeting the standards of Section 203 of the Act.

*Section 322.2(h):* This section was proposed to add the definition of the term "outer continental shelf" from the Outer Continental Shelf Lands Act (OCSLA). Two commenters suggested that the territorial sea off the Gulf Coast of Florida and Texas is greater than three nautical miles from the coast line. We have determined that this is not the case, and have decided not to include a definition of the term "outer continental shelf" in these regulations and to rely instead on the definition of this term that is already in the OCSLA.

*Sections 322.3(a) and 322.4:* Activities which do not require a permit have been moved from § 322.3 and included in § 322.4. The limitation of the applicability of Section 154 of the Water Resource Development Act of 1976 in certain waterbodies has been deleted because no such limitation exists in that Act.

*Section 322.5(b):* This section addresses the policies and procedures for processing artificial reef applications. One commenter suggested that the opportunity for a general permit should not be precluded by this section. A general permit for artificial reefs is not precluded by this regulation change. Furthermore, the opportunity for the issuance of general permits may be enhanced with the implementation of the National Artificial Reef Plan by the Department of Commerce.

*Section 322.5(b)(1):* This section cites the standards established under section 203 of the National Fishing Enhancement Act. These standards are to be met in the siting and construction, and subsequent monitoring and managing, of artificial reefs. Two commenters insisted that these should be called goals or objectives, and several commenters said that more specific guidelines or criteria are needed to evaluate proposed artificial reefs against the standards or goals. Section 204 of the Act states that the Department of Commerce will develop a National Artificial Reef Plan which will be consistent with the standards established under Section 203, and will include criteria relating to siting, constructing, monitoring, and managing artificial reefs. Specification of such criteria in these rules would be inappropriate in view of the intent of Congress to have the Department of Commerce perform this function. The National Marine Fisheries Service (NMFS), acting for the Department of Commerce, has consulted with us in developing the National Artificial Reef Plan, and we will continue to consult with them to ensure permits are issued consistent with the criteria established in that plan. The Department of Commerce announced the availability of the National Artificial Reef Plan in the Federal Register on November 14, 1985.

The U.S. Coast Guard was particularly concerned that these rules be more specific with regard to information and criteria that will be used to ensure navigation safety and the prevention of navigational obstructions. Section 204 of the National Fishing Enhancement Act requires that the Department of Commerce consult the U.S. Coast Guard in the development of the National Artificial Reef Plan regarding the criteria to be established in the plan. One of the standards with which the criteria must be consistent is the prevention of unreasonable obstructions to navigation. In addition, the district engineer shall consult with any governmental agency or interested party, as appropriate, in issuing permits for artificial reefs. This includes pre-application consultation with the U.S. Coast Guard, and placing conditions in permits recommended by the U.S. Coast Guard to ensure navigational safety.

*Section 322.5(b) (2) and (3):* These sections state that the district engineer will consider the National Artificial Reef Plan, and that he will consult with governmental agencies and interested parties, as necessary, in evaluating a permit application. Two commenters supported this coordination. The NMFS requested notification of decisions to issue permits which either deviate from or comply with the plan. Paragraph (b)(2) requires the district engineer to notify the Department of Commerce of any need to deviate from the plan. In addition, the NMFS receives a monthly list of permit applications on which the

district engineer has taken final action. This should be sufficient notification for those permits which do not deviate from the plan.

*Section 322.5(b)(4):* Although some commenters strongly supported this section describing the liability of permittees authorized to build artificial reefs, several expressed concern that this provision was not clearly written or required specific criteria to assist the district engineer in determining financial liability. This paragraph has been rewritten to correspond closely with the wording in the National Fishing Enhancement Act, and examples of ways an applicant can demonstrate financial responsibility have been added.

*Section 322.5(g):* We have revised this paragraph on canals and other artificial waterways by eliminating procedural-only provisions which are redundant with requirements in 33 CFR Parts 325 and 326.

*Section 322.5(l):* A new section on fairways and anchorage areas has been added. This section was formerly found at 33 CFR 209.135. We are moving this provision to consolidate all of the permit regulations on structures to this part. We will delete 33 CFR 209.135 by separate notice in the Federal Register.

*Part 323—Permits for Discharges of Dredged or Fill Material Into Waters of the United States*

*Section 323.2:* Several commenters supported moving the definitions relating to waters of the United States to a separate paragraph. As proposed on May 12, 1983, we have moved the term "waters of the United States" and all other terms related to the geographic scope of jurisdiction of Section 404 of the CWA to 33 CFR Part 328 which is titled "Definition of the Waters of the United States." We believe that, by setting these definitions apart in a separate and distinct Part of the regulation and including in that Part all of the definitions of terms associated with the scope of the Section 404 permit program, we are better able to clarify the scope of our jurisdiction. We have not changed any existing definitions nor added any definitions proposed on May 12, 1983. Comments related to these definitions are addressed in Part 328 below.

We have not changed the definition of fill material at § 323.2(e). However, the Corps has entered into a Memorandum of Agreement with the Environmental Protection Agency to better identify the difference between section 402 and section 404 discharges under the Clean Water Act.

*Section 323.2(d)—Previously 323.2(j):* The proposed modification of this paragraph states that *"de minimis* or incidental soil movement occurring during normal dredging operations" is not a "discharge of dredged material," the term defined by this paragraph.

Eight commenters raised concerns relating to this provision. Most of these supported the regulation of *"de minimis* or incidental soil movement occurring during normal dredging operations" in varying degrees. Two specifically expressed a belief that the fallback from dredging operations constituted a discharge within the intent of section 404 of the Clean Water Act. One of these stated that the proposed provision was contrary to a binding decision by the U. S. District Court for the Northern District of Ohio in *Reid* v. *Marsh,* No. C-81-690 (N. D. Ohio, 1984). Another commenter objected to the provision on the basis that it would force states that perceived a need to regulate dredging operations to regulate such activities under their National Pollutant Discharge Elimination System authority. The recommendations of the above group of commenters included the regulation of dredging activities on an individual or general permit basis or on a selective basis that would take into account the scopes and anticipated effects of the projects involved. Two commenters expressed concern over the fact that discharge activities such as the sidecasting of dredged material might be considered "soil movement" that was "incidental" to a "normal dredging operation." The final concern raised related to the list of dredging equipment cited as examples. This list was seen, alternatively, as too limited or as not limited enough in reference to the types of equipment that may be used in a "normal dredging operation." Four commenters supported the proposed provision as a reasonable interpretation of the section 404 authority of the Corps.

Section 404 clearly directs the Corps to regulate the *discharge* of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404. The purpose of dredging is to remove material from the water, not to discharge material into the water. Therefore, the fallback in a "normal dredging operation" is incidental to the dredging operation and *de minimis* when compared to the overall quantities removed. If there are tests involved, we believe they should relate to the dredging operator's intent and the result of his dredging operations. If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a "normal dredging operation" that is not subject to section 404.

Based on the above discussion, we have not adopted any of the recommendations relating to the revision or deletion of this provision for the purpose of bringing about the regulation of "normal dredging operations" in varying degrees. We have replaced the "or" between the words *"de minimis"* and "incidental" with a comma to more clearly reflect the fact that the incidental fallback from a "normal dredging operation" is considered to be *de minimis* when compared to the overall quantities removed. In addition, we have deleted the examples of dredging equipment at the end of the proposed provision to make it clear that *de minimis* or incidental soil movement occurring during *any* "normal dredging operation" is not a "discharge of dredged material." However, we wish to also make it clear that this provision applies only to the incidental fallback occurring during "normal dredging operations" and not to the disposal of the dredged material involved. If this material is disposed of in a water of the United States, by sidecasting or by other means, this disposal will be considered to be a "discharge of dredged material" and will be subject to regulation under section 404.

*Section 323.4:* We have made some minor corrections to this section to be consistent with EPA's permit exemption regulations at 40 CFR Part 233.

*Part 324—Ocean Disposal*

*Section 324.4(c):* The language of this section on the EPA review process has been rewritten to clarify the procedures the district engineer will follow when the Regional Administrator advises that a proposed dumping activity does not comply with the criteria established pursuant to section 102(a) of the Marine Protection, Research and Sanctuaries Act (MPRSA), or the restrictions established pursuant to section 102(c) thereof, in accordance with the provisions of 40 CFR 225.2(b).

*Part 325—Permit Processing*

Several minor changes have been made in this part. These changes involve requesting additional information from

an applicant, providing for a reasonable comment period, combining permit documentation, and documenting issues of national importance.

*Section 325.1(b):* This section has been rewritten to clarify the pre-application consultation process for major permit applications. No significant changes have been made in the content of this section.

*Section 325.1(d)(1):* One commenter on this content of applications paragraph asked that where, through experience, it has been found that specific items of additional information are routinely necessary for permit review, the district engineer should be allowed to develop supplemental information forms. Another observed that restricting production of local forms may inhibit joint permit application processes. If it becomes necessary to routinely request additional information, the Corps can change the application form, but that must be done at Corps headquarters with the approval of the Office of Management and Budget. This change does not place any additional restrictions on developing local forms. As is now the case, local forms may be developed for joint processing with a Federal or state agency.

*Section 325.1(d)(8):* This is a new section requiring an applicant to include provisions for siting, construction, monitoring and managing the artificial reef as part of his application for a permit. One commenter suggested that the criteria for accomplishing these activities must be completed in the National Artificial Reef Plan before establishment of such reefs can be encouraged. Another recommended that the regulation describe more specifically the information to be supplied by an applicant with regard to monitoring and maintaining an artificial reef. The plan includes general mechanisms and methodologies for monitoring the compliance of reefs with permit requirements, and managing the use of those reefs. It can be used as a guide for the information to be supplied by the permit applicant. Specific conditions for monitoring and managing, as well as for maintaining artificial reefs generally need to be site-specific and should be developed during permit processing.

The U.S. Coast Guard requested that they be provided copies of permit applications for artificial reefs, and that a permittee be required to notify the Coast Guard District Commander when reef construction begins and when it is completed so timely information can be included in notices to mariners. The district engineer may elect to consult with the Coast Guard, when appropriate, during the pre-application phase of the permit process. At any rate, the Coast Guard will receive public notices of permit applications, and may make recommendations to ensure navigational safety on a case-by-case basis. Appropriate conditions can be added to permits to provide for such safety.

*Section 325.1(e):* Several commenters expressed concern with language changes requiring only additional information "essential to complete an evaluation" rather than the former requirement for information to "assist in evaluation of the application." They felt this change would reduce the data base on which decisions would be made. They indicated further that without necessary additional information, district engineers would not be able to make a reasonable decision, the public's ability to provide meaningful comments would be limited, and resource agencies would have to spend more time contacting the applicant and gathering information. They felt this could increase delays rather than limiting them. Several commenters asked that the regulations be altered to specifically require submission of information necessary for a 404(b)(1) evaluation. Similar concerns were expressed with the change stating that detailed engineering plans and specifications would not be required for a permit application. Commenters advised that without adequate plans or the ability to routinely require supplemental information it may be impossible to insure compliance with applicable water quality criteria or make reasonable permit decisions. Other commenters wanted further restrictions placed on the district engineer's ability to request additional information. Suggestions included altering the regulations to specify the type, need for, and level of detail which could be requested, and requiring the district engineer to prepare an analysis of costs and benefits of such information. Some commenters objected to requirements for providing information on project alternatives and on the source and composition of dredged or fill material.

This paragraph has been changed as proposed. The intent of this change was to assure that information necessary to make a decision would be obtained, while requests for non-essential information and delays associated with such requests would be limited.

*Section 325.2(a)(6):* The new requirement to document district engineer decisions contrary to state and local decisions was adopted essentially as proposed. The reference to state or local decisions in the middle of this paragraph incorrectly did not reference § 320.4(j)(4) in addition to § 320.4(j)(2). The adopted paragraph references state and local decisions in both of these paragraphs.

*Section 325.2(b)(1)(ii):* The May 12, 1983, proposed regulations sought to speed up the process by reducing the standard 60 day comment/waiver period to 30 days for state water quality certifications. Commenters on this paragraph offered a complete spectrum of views from strong support for the proposed changes to strong opposition to the proposal. Comments within this spectrum included opinions that: states must have 60 days; certification time should be the same as allowed by EPA (i.e. 6 months); the proposal is illegal; it conflicts with some state water quality certification regulations and procedures; and it would reduce state and public input to the decision-making process. Most states objected to this reduction with many citing established water quality certification procedures required by statute and/or regulations which require notice to the public (normally 30 days) and which allow requests for public hearings which cannot be completed within the 30-day period. We have, therefore, retained the 60 day period in the July 22, 1982, regulations. Some Corps districts have developed formal or informal agreements with the states, which identify procedures and time limits for submittal of water quality certifications and waivers. Where these are in effect, problems associated with certifications are minimized.

Many commenters objected to the May 12, 1983, proposal to delete from the July 22, 1982, regulations the statement, "The request for certification must be made in accordance with the regulations of the certifying agency." Deleting this statement will not delete the requirement that valid requests for certification must be made in accordance with State laws. However, we have found that, on a case-by-case basis in some states, the state certifying agency and the district engineer have found it beneficial to have some flexibility to determine what constitutes a valid request. Furthermore, we believe that the state has the responsibility to determine if it has received a valid request. If this statement were retained in the Corps regulation, it would require the Corps to determine if a request has been submitted in accordance with state law. To avoid this problem, we have decided to eliminate this statement.

*Section 325.2(d)(2):* Numerous commenters expressed concern with comment periods of less than 30 days. They were concerned that, in order to expedite processing times, 15 day

notices would become the norm. These commenters stated that 15 days was insufficient to prepare substantive comments and would not allow the public adequate participation in the permit process as mandated by Section 101 of the CWA. State agencies noted that, with internal and external mail requiring as much as a week each for the Corps and the state, 15 days would not provide any time for consideration of a project. Several commenters noted that such expedited review times might actually be counter-productive, as Federal and state agencies might routinely oppose projects and request permit denial so that they would then have sufficient time to review a project and to work with an applicant to resolve conflicts. We recognize that 15 days is a very short comment period considering internal agency processing and mail time. We expect that comment periods as short as 15 days would be used only for minor projects where experience has shown there would be little or no controversy. Some districts have been routinely using comment periods of less than 30 days (20 and 25 days) while others have used such procedures in only a limited number of special cases. In adopting this provision, we have modified the May 12, 1983, proposal to require the district engineer to consider the nature of the proposal, mail time, the need to obtain comments from remote areas, comments on similar proposals, and the need for site visits before designating public notice periods of less than 30 days. Additionally, after considering the length of the original comment period as well as those items noted above, the district engineer may extend the comment period an additional 30 days if warranted. We believe this provides the desired flexibility with the necessary restraints on when to use comment periods of less than 30 days.

*Sections 325.2(e)(1) and 325.5(b)(2):* Commenters supporting the use of letters of permission (LOP) for minor section 404 activities stated that applicants will realize significant time savings for minor requests while there will be no loss in environmental protection. Objectors believe that the Corps is seeking administrative expediency at the cost of environmental protection. Issues raised by commenters include: the legality of the 404 LOP procedure without providing for notice and opportunity for public hearing (Section 404(a) of the CWA); the legality of issuing a permit which would become effective upon the receipt or waiver of 401 certification and/or a consistency certification under the CZMA; the need to be more definitive as to the criteria for making a decision as to the categories of activities eligible for authorization under the LOP; and the lack of coordination with Federal and state resource agencies. A few commenters were concerned that the notice in the May 12, 1983, Proposed Rules was insufficient because it did not give the scope and location of the work to be covered. The commenting states also indicated that the notice was insufficient for water quality certification and coastal zone consistency determination purposes. Other commenters were concerned that, while LOP's would be coordinated with Federal and state fish and wildlife agencies, other resource agencies such as EPA should also review Section 404 LOP's. Based on the comments on the proposed 404 LOP procedures, we have decided not to adopt the 404 LOP procedures as proposed. We are not changing § 325.5(b)(2), LOP format, nor are we changing the section 10 LOP provisions. Rather, we have revised § 325.2(e)(1) to describe a separate section 404 LOP process. Unlike the section 10 LOP process, the section 404 process involves the identification of categories of discharges and a generic public notice. This LOP process is a type of abbreviated permit process which could and has been developed under the July 22, 1982, interim final regulations. These procedures will avoid unnecessary paperwork and delays for many minor section 404 projects in accordance with the intent of Section 101(f) of the Clean Water Act

*Section 325.7(b):* We have added a provision that, when considering a modification to a permit, the district engineer will consult with resource agencies when considering a change to terms, conditions, or features in which that agency has expressed a significant interest.

*Section 325.9:* One commenter generally supported this section on the district engineer's authority to determine jurisdiction but indicated that § 325.9(c) should not be adopted because it reflects the provisions of a Memorandum of Understanding (MOU) with EPA and would not be applicable if the MOU is revised or deleted. We have determined that this paragraph is not now needed and have decided not to adopt it.

**Appendix A—Permit Form and Special Conditions**

*A. Permit Form*

*Project Description:* A comment was received stating that intended use should be specified for all permitted work and not just for the fills involved. A comment was also received suggesting that we be more specific on what discharges are covered by permit authorizations. We agree with these points and have made appropriate changes to the instructional material relating to project descriptions.

General Conditions

*General Condition 1:* Several commenters stated that the specified three month lead time on the requesting of permit extensions was too long. We agree with these commenters and have, therefore, reduced this lead time from three to one month.

*General Condition 2:* One commenter recommended that the wording of this condition, relating to the maintenance of authorized work, be modified to indicate that restoration may be required if the permittee fails to comply with the condition. We agree and have modified the condition accordingly. Another commenter stated that it would not be reasonable to enforce this condition when a permitted underground facility is abandoned. We generally agree with this statement. However, we believe the procedures governing the enforcement of permit conditions are flexible enough to allow a reasonable approach in such situations.

*General Condition 3:* One commenter indicated that this condition should be modified to require the permittee to halt work that could damage discovered historic resources and to protect those resources from inadvertent damage. That commenter also indicated that under certain circumstances it would not be necessary to notify the Corps or to halt work. This notification requirement has been in effect since 1982, and the continuation of this requirement provides for the Corps to be notified in a timely manner. With this notification, the Corps can react quickly to determine the appropriate course of action. We believe this approach has proven to be satisfactory. Therefore, this condition is being adopted as proposed.

*Proposed General Condition 4:* In our proposal, we specifically requested comments on this condition, which would require recording the permit on the property deed. More than half the comments received were on this proposal. All but one of the commenters who addressed this condition were critical of it to a greater or lesser degree. Institutional interest observed that this condition would only add to their costs, since once lands were purchased they were seldom sold. Institutional and industrial interests observed that permits often relate to easements and

not to fee simple ownership and that compliance with the proposed condition, in such situations, would not be possible or meaningful in some locations. One commenter stated that a recordation condition should not be necessary, provided permittees complied with proposed General Condition 5, which requires owners to notify the Corps when property is transferred. To strengthen the property transfer condition, we have modified the statement preceding the transferee's signature to specify that the requirement to comply with the terms and conditions of the permit moves with the property. One commenter stated that a general condition requiring recordation where possible would be unfair, since it would not be uniformly applicable to all permittees. Further coordination with our field offices indicates that compliance with and use of the proposed condition probably occurs only in a few locations. This coordination also indicates that for some jurisdictions, where recordation is possible, the cost of recordation may be so great that it exceeds the benefits. Given that recordation may not be practical or appropriate for all Corps permits, we have deleted this general condition from the permit form and renumbered the remaining general conditions accordingly. On the other hand, the recordation requirement is appropriate and useful for many types of structures needing Corps permits, to provide fundamental fairness toward future purchasers of real property and to facilitate enforcement of permit conditions against future purchasers. For example, if the Corps were to issue a permit for a pier, that permit would require the owner to maintain the pier in good condition and in conformance with the terms and conditions of the permit. If the builder of the pier were to allow the pier to deteriorate, he could easily transfer the pier and associated property with no notice to the purchaser of the legal obligation to repair and maintain the pier, unless the permit were recorded along with the title documents relating to the associated property. This failure to give notice to prospective purchasers would be unfair, and would increase the Federal Government's difficulty in enforcing permit conditions against future purchasers. Because of this important notice function, we have added a recordation condition under B. Special Conditions, for use wherever recordation is found to be reasonably practicable and appropriate.

*General Condition 4 (Proposed General Condition 5):* One commenter suggested that this condition, relating to the transference of the permit with the property, be modified to provide for notice and approval from the Corps before the permit is transferred. The reason given for this suggestion was that the Corps may have special knowledge of the particular transferee's history and capabilities and may wish to modify the terms and conditions of the permit accordingly. The suggested change would require the issuing office to conduct a review and prepare decision documentation every time property is transferred and there is a Corps permit involved. We believe that such a review in every case involving the transfer of a permit would constitute an inefficient use of available resources. Under the procedures contained in 33 CFR 325.7, a permit is subject to suspension, modification, or revocation at any time the Corps determines such action is warranted. We believe this is a better approach, and have, therefore, retained the proposed wording of this condition.

*General Condition 5 (Proposed General Condition 6):* One commenter recommended that this proposed condition, which relates to compliance with the provisions of the water quality certification, be changed to provide for the modification of the Corps permit if EPA promulgates a revised Section 307 standard or prohibition which applies to the permitted activity. We agree that permits must be modified when circumstances warrant. Procedures governing modifications are contained in 33 CFR 325.7, and we advise permittees of these procedures in item 5 (Reevaluation of Permit Decision) under the "Further Information" heading. Therefore, since we believe this potential requirement for permit modifications is adequately covered under the "Further Information" heading, we have retained the proposed wording of this condition.

*General Condition 6 (Proposed General Condition 7):* One commenter noted that compliance inspections should be conducted during normal working hours. As a general rule, this observation seems reasonable. However, since we believe that compliance inspections will be scheduled during normal working hours when possible, we have not made any changes to the proposed wording of this condition.

Further Information

*Limits of Federal Liability:* One commenter suggested that the Government could, under certain circumstances, be held liable for damages caused by activities authorized by the permit and suggested that Item 3, which limits the Government's liability, be deleted in its entirety. While it is true that some courts have found the United States liable for damages sustained by the owners of permitted structures or by individuals injured in some way by those structures, it has never been the intent of the Corps to assume either type of liability or to insure that no interference or damage to a permitted structure will occur after it has been built. In permitting structures within navigable waters, the Corps does not assume any duty to guarantee the safety of that structure from damages caused by the permittee's work or by other authorized activities in the water, such as channel maintenance dredging. This is viewed as an acceptable limitation on the privilege of constructing a private structure for private benefit in a public waterway, particularly since insurance is readily available to protect the permittee from any damage his structure may sustain. Accordingly, the language in Item 3 has been further clarified to preclude any inference that the Government assumes any liability for interference with or damage to a permitted structure as a result of work undertaken by or on behalf of the United States in the public interest.

*Reevaluation of Permit Decision:* One commenter recommended that reevaluations be limited to the three circumstances listed. Although we believe that the vast majority of the reevaluations required will qualify under one of the three listed circumstances, we cannot exclude the possibility of non-qualifying, unique situations where the public's good may require a reevaluation of a permit decision. Therefore, we have retained the wording which states that reevaluations will not necessarily be limited to the circumstances listed. Another commenter recommended that we add to this item that we have the authority to issue administrative orders to require compliance with the terms and conditions of permits and to initiate legal actions where appropriate. The procedures governing these actions are contained in 33 CFR 326.4 and 326.5 and reference was made to these procedures in the proposed wording. However, we agree that it would be helpful to modify the proposed wording to provide permittees with a better understanding of our enforcement options; we have modified the text accordingly.

*B. Special Conditions*

One commenter suggested that Special Condition 5, which requires permittees authorized to perform certain types of work to provide advance notifications to the National Ocean

Service and the Corps before beginning work, be changed to allow verbal notifications followed by written confirmations. We have determined that this suggestion, if adopted, would greatly increase the chance of errors in notice documents published by the Government and would not be in the best interest of mariners. Two weeks advance notice is a reasonable period of time both for construction scheduling and for Government notification to mariners. Therefore, we have not adopted this suggestion.

One commenter suggested that a special condition be added, for use when appropriate, to require the permittee to carry out a historic preservation plan attached to the permit. The wording of special conditions are normally determined on a case-by-case basis. Only those that are used often and are subject to standardized wording are listed in Appendix A (B. Special Conditions). While we agree that special conditions of this nature may be required, we do not believe they lend themselves sufficiently to standardized wording to warrant adding a specific special condition to Appendix A.

Three comments were received which related to General Condition (n) on the previous permit form. This condition required the permittee to notify the issuing office of the date when the work authorized would start and of any prolonged suspensions before the work was complete. Two of the commenters recommended that this provision be retained as a general condition, and one commenter recommended that it be specified as a special condition. Our research indicates that this condition, as a general condition applicable to all permitted activities, has been virtually unenforceable in most areas and of limited use as a permit monitoring tool. We agree that special conditions requiring permittees to notify the Corps, in advance, of the dates permitted activities will start, are appropriate in certain situations. Two of these situations are covered by Special Condition 3 (maintenance dredging) and Special Condition 5 (charting of activities by National Ocean Service). Since we believe our field offices are in the best position to identify any other situations in which similar special conditions would be appropriate, we have not adopted these recommendations.

As discussed under Proposed General Condition 4 above, we have added a sixth special recordation condition for use where recordation is found to be reasonably practicable.

*General:* In addition to several editorial changes, we have added definitions for the word "you" and its derivatives and the term "this office" at the beginning of the permit form. We have substituted the term "this office" for references to the district engineer throughout the form.

Part 326—Enforcement

*General:* Three commenters objected to what they perceived as a lack of specific requirements and recommended that the word "should" be changed to "shall" throughout Part 326. Another commenter stated that the proposed regulations were too specific and recommended that a significant amount of the procedures in this Part be deleted and addressed in internal guidance. The word "should," where used, allows district engineers to base their enforcement actions on an assessment of what is the best approach on a case-by-case basis. The word "shall" would require district engineers to implement specified actions even though such actions may be obviously inappropriate in relation to a particular case. We believe this flexibility is appropriate and have, therefore, retained the word "should" in most of the places where it occurred in the proposed regulations. However, the word "will" is used at various places in this Part where flexibility is not appropriate. We believe that the proposed language achieves a proper balance between the providing of necessary guidance and flexibility.

Finally, one commenter suggested that Part 326 be rewritten to include only two requirements: orders for immediate restoration of filled wetlands and referrals for legal action if these orders are not complied with. When Congress established the Corps regulatory authorities, it allowed for the issuance of permits. To ignore the issuance of permits as one means of resolving violations would be inappropriate.

*Section 326.1:* As a result of further internal coordination, we have determined that it would be appropriate to make it clear that nothing in this Part establishes a non-discretionary duty on the part of a district engineer. Further, nothing in this Part should be considered as a basis for a private right of action against a district engineer. Therefore, we have modified this paragraph accordingly.

*Section 326.2:* One commenter recommended that this statement of general enforcement policy be expanded to provide priority guidance on enforcement actions. Two other commenters recommended strengthening of this paragraph, with one recommending that it cite the firm and fair enforcement of the law to prohibit and deter damage, to require restoration, and to punish violators as the purpose of the Corps enforcement program. In that we refer in this paragraph to unauthorized activities, we are reflecting the fact that these activities are unauthorized and subject to enforcement actions pursuant to the legal authorities cited at the beginning of this Part. Further, the other recommended changes would simply duplicate the discussions of enforcement methods and procedures already contained in §§ 326.3, 326.4, and 326.5. However, we have added a statement to this provision to reflect the fact that EPA has independent enforcement authorities under the Clean Water Act, and thus, district engineers should normally coordinate with EPA.

*Section 326.3(b):* One commenter recommended that this paragraph be amended to require the establishment of numbered file systems for violations. Most Corps districts already assign control numbers to enforcement actions, and since this is an administrative function, we have determined that it would be inappropriate to include this requirement in a Federal regulation designed to provide enforcement policy.

*Section 326.3(c)(2):* One commenter suggested rewording of this paragraph to make it clear that a violation involving a completed activity may or may not be resolved through the issuance of a Corps permit. The reference in the proposed wording to not initiating "any additional work before obtaining required Department of the Army authorizations" apparently led to the commenter misunderstanding this paragraph. The intent of this wording related to warning a violator not to initiate work on other projects before obtaining required Corps permits. Since the violator is in the process of being made aware of the legal requirements for obtaining Corps permits, we have determined that this warning is unnecessary and have, therefore, deleted it.

*Section 326.3(c)(3):* One commenter recommended that this paragraph be amended to indicate that the information requested will also be used for determining whether legal action is appropriate in addition to determining what initial corrective measures may be required. We agree that the information obtained from violators may provide a basis for enforcement decisions other than those relating to interim corrective measures. Therefore, we have revised this provision to provide for notifying violators of potential enforcement consequences and for the more generalized use of the information provided by violators in the

identification of appropriate enforcement measures.

*Section 326.3(c)(4):* One commenter recommended that this provision be reworded to indicate that the limitations on unauthorized work of an emergency nature are to be established in conjunction with Federal and state resource agencies. We believe it is understandable that actions of this type will be completed on an expedited basis with the procedures in § 326.3(c–d) being followed concurrently. Since § 326.3(d) already provides for interagency consultations, in appropriate cases, we do not believe it is necessary to duplicate that guidance in this provision.

*Section 326.3(d)(1):* One commenter recommended that "initial corrective measures" be defined as measures "which substantially elminate all current and future detrimental impacts resulting from the unauthorized work." This commenter also recommended that the procedures in 33 CFR 320.4 and 40 CFR Part 230 be referenced for use in determining what "initial corrective measures" are required. Essentially, this commenter is recommending that all violators be denied a Corps authorization and required to undertake full corrective measures in the initial stage of an enforcement action. This would not be a reasonable or practical approach, since it would eliminate public participation and would result in the removal of work that may have been permitted under normal circumstances. Another commenter objected to the statement that further enforcement actions "should normally" be unnecessary if the initial corrective measures substantially eliminate all current and future detrimental impacts. This commenter sees this provision as barring legal action in appropriate cases such as those involving willful, flagrant, or repeated violations. This is not the case. To say that such corrective measures "should normally" resolve a violation does not mean that they will "always" resolve a violation. Another commenter stated that consultations with the Fish and Wildlife Service and the National Marine Fisheries Service should be made mandatory in this paragraph pursuant to the Fish and Wildlife Coordination Act. The reason given was that this provision would result in the issuance of permits which would require such consultations. This paragraph deals with initial corrective measures and not with the issuance of permits. These agencies will be given an opportunity to comment in response to a public notice before any decision is made on an after-the-fact permit application. In view of the above discussion, we have retained the proposed wording of this paragraph.

*Section 326.3(d)(2):* One commenter recommended that this paragraph be deleted on the basis that it provided the district engineer with too much discretion and questioned the cross-reference to § 326.3(3). This paragraph was intended to provide guidance to district engineers in situations involving prior initiations of litigation or denials of essential authorizations or certifications by other Federal, state or local agencies. We believe district engineers should have the discretionary authority to determine what is a reasonable and practical course of action for the Corps under these circumstances. However, we have revised this paragraph to clarify its intent and to correct the cross-reference.

*Section 326.3(d)(3):* As a result of further review within the Corps, we have determined that the provision proposed as § 326.3(e)(1)(i), which states that it is not necessary to issue a Corps permit for initial corrective measures, should be moved to § 326.3(d) to more appropriately reflect the sequence of enforcement procedures. Therefore, we have modified this provision and established it as new § 326.3(d)(3).

*Section 326.3(e):* One commenter objected to the after-the-fact permit process, and observed that the process was generally seen as a mechanism to avoid compliance with the law. Exceptions to the processing of after-the-fact permit applications are contained in § 326.3(e)(i–iv). However, in most cases, the public participation associated with the processing of an application is necessary before a violation can be appropriately resolved.

*Section 326.3(e)(1):* One commenter recommended that this paragraph be amended to specify the criteria for legal action and to require that public notices associated with after-the-fact permit applications clearly identify that a violation is involved. The criteria for legal actions are given in § 326.5(a), and permit decisions are based on whether an activity complies with the section 404(b)(1) Guidelines, where applicable, and on whether it is or is not found to be contrary to the public interest. Permit decisions are not based on whether a permit application is before or after-the-fact. We have, therefore, retained the proposed wording of this paragraph.

*Proposed Section 326.3(e)(1)(i):* We have deleted this provision here and have moved a modified version of it to new § 326.3(d)(3); see discussion under § 326.3(d)(3).

*Section 326.3(e)(1)(i)—Proposed as 326.3(e)(1)(ii):* This provision indicates that the processing of an after-the-fact permit application will not be necessary "when" detrimental impacts have been eliminated by restoration. One commenter recommended that district engineers be required to consult with EPA before determining that restoration has been completed that eliminates current and future detrimental impacts. We have addresse this comment by modifying § 326.2 and § 326.3(g) to provide for such coordination when the district engineer is aware of an enforcement action being considered by EPA under its independent enforcement authorities. Another commenter observed that the word "when" appeared to be in error and recommended substituting the word "unless." This would indicate that the Corps should process an after-the-fact permit application only after restoration had taken place and there is no work requiring a permit. This obviously would not be reasonable. In view of the above discussion, we have retained the proposed wording of this provision.

*Section 326.3(e)(1)(iii)—Proposed as 326.3(e)(1)(iv):* One commenter recommended that a provision be added to this paragraph to prohibit the acceptance of an application for a Corps permit where an activity is not in compliance with other Federal, state, or local authorizations or certifications. In essence, this amounts to requiring district engineers to take steps to enforce the terms and conditions of another agency's authorization or certification. We believe this is the issuing agency's responsibility and not the responsibility of the Corps. Of course, where that other agency has denied a requisite authorization, the Corps would not accept an application for processing.

*Section 326.3(e)(1)(iv)—Proposed as 326.3(e)(1)(v):* Two commenters recommended rewording of this paragraph to prohibit the acceptance or processing of any after-the-fact permit application when the Corps is aware of litigation or other enforcement actions that have been initiated by other Federal, state or local agencies. We believe the Corps should, in appropriate situations, be able to take positions on cases that are in conflict with the viewpoints of other agencies. Therefore, we have retained the wording of this paragraph essentially as proposed. However, since EPA has independent enforcement authorities, we have provided for coordination with EPA in §§ 326.2 and 326.3(g).

*Section 326.3(g):* One commenter indicated that this paragraph should delineate EPA's responsibility over

recognizing and reporting unpermitted discharges. This paragraph deals only with cases where EPA is considering an enforcement action. The reporting of violations is covered under § 326.3(a). Another commenter recommended that this paragraph be reworded to ensure that Corps actions under Part 326 are not in conflict with EPA enforcement actions. Another commenter, a state agency, suggested that this provision be expanded to require similar consultations with state agencies that have initiated enforcement actions. The reason we have provided for consultations with EPA in this paragraph is due to the fact that both the Corps and EPA have overlapping authorities pursuant to the Clean Water Act. This is not the case with state agencies. Nevertheless, we believe district engineers will wish to consult with state agencies in appropriate circumstances. In any event, as we stated in our discussion relating to the wording of § 326.3(e)(iv), we believe the Corps should have the right to take a position that may conflict with another agency's viewpoint. However, we have revised this provision to emphasize that district engineers should coordinate with EPA when they are aware of enforcement actions being considered by EPA under its independent enforcement authorities.

*Section 326.4(a–b):* As a result of further internal coordination, we have determined that § 326.4(a) should make it clear that district engineers have the discretionary authority to determine when the inspection of permitted activities is appropriate. We have modified § 326.4(a) accordingly. In addition, we have added a new § 326.4(b) to further discuss inspection limitations.

*Section 326.4(d)—Proposed as 326.4(c):* One commenter, a state agency, objected to the provisions in this paragraph for attempting to obtain voluntary compliance before issuing a formal compliance order. The rationale given was that the absence of a formal order would make coordination between the Corps and the state difficult. Another state agency recommended consultations with state agencies and with EPA. The proposed, non-compliance procedures do not prohibit early coordination with other regulatory agencies, when appropriate, and presumably, if the permittee quickly brings his work into compliance, such coordination should not be necessary.

One commenter objected to allowing a district engineer to issue a compliance order and to not making the use of Corps suspension/revocation procedures or legal actions mandatory. Another commenter recommended that suspension/ revocation procedures or legal actions be made mandatory if a violator fails to comply with a compliance order. The issuance of a compliance order is provided for in section 404(s) of the Clean Water Act, and in most cases, we believe that the methods available for obtaining voluntary compliance should be used before discretionary consideration is given to using the Corps suspension/ revocation procedures or initiating legal action.

Another commenter objected to the term "significantly serious to require an enforcement action" on the basis that all violations are worthy of some enforcement action. Minor deviations from the terms and conditions of a Corps permit may not always warrant an enforcement action. For example, would a dock authorized to be constructed with a length of 50 feet but inadvertently constructed with a length of 51 feet constitute a violation warranting an enforcement action? We agree there may be extenuating circumstances, such as the additional length of the dock being just enough to impact the water access of a neighbor. However, this is a judgment that is best made by the district engineer involved.

One Commenter objected to the term "mutually agreeable solution" on the basis that such a solution could invalidate the prior results of coordination with resource agencies. Since this term refers to bringing the permitted activity into compliance or the resolution of the violation with a permit modification using the modification procedures in 33 CFR 325.7(b), such resolutions would not invalidate prior coordination. In view of the above discussion, we have retained the proposed wording of this paragraph.

*Section 326.5(a):* One commenter requested that the words "willful" and "repeated" be deleted from this paragraph, the rationale being, apparently, that most violators are not repeat or willful offenders and that the Corps should take the one opportunity it has to bring legal action against these one-time violators. We do not agree with this approach as being either reasonable or practical. Another commenter recommended adding violations that result in substantial impacts to the list of violations that should be considered appropriate for legal action. We agree with this recommendation and have modified the wording of this provision accordingly.

*Section 326.5(c):* One commenter recommended rewording of this paragraph to require that copies be provided to EPA of Corps referrals to local U.S. Attorneys. We believe it would be more appropriate to address matters relating to the detailed aspects of interagency coordination in interagency agreements. Therefore, we have retained the proposed wording of this paragraph.

*Section 326.5(d)(2):* As a result of further internal coordination, we have determined that litigation cases involving isolated water no longer need to be referred to the Washington level on a routine basis. Therefore, we have deleted this provision.

*Section 326.5(e):* One commenter recommended that the word "may" be replaced with the words "encouraged to" in the provision relating to sending litigation reports to the Office of the Chief of Engineers when the district engineer determines that an enforcement case warrants special attention and the local U.S. Attorney has declined to take legal action. We agree with this recommendation and have made the change.

Another commenter suggested that wording be aided to this paragraph to address circumstances in which permits are not required. The fact that a legal option may not be available does not mean that a permit is not required. If the district engineer chooses to close the case record, the activity in question will still be unauthorized and therefore illegal. Such unauthorized activities will be taken into account if the responsible parties become involved in future violations. One commenter suggested that Corps attorneys initiate legal actions as an alternative to actions by local U.S. Attorneys. However, the Corps does not have the authority under existing Federal laws to initiate legal actions on its own.

Another commenter recommended that this paragraph be modified to provide for joint Federal/state prosecution of violators. Since this involves discretionary decisions on the part of the Department of Justice, it would not be appropriate to include a provision of this nature in the Corps enforcement regulations.

Part 328—Definition of Waters of the United States

This part is being added in order to clarify the scope of the Section 404 permit program. This part was added in direct response to many concerns expressed by both the public and the Presidential Task Force on Regulatory Relief. We have not made changes to existing definitions; however, we have provided clarification by simply setting

them apart in a separate and distinct Part 328 of the regulation.

The format for Part 328 has been changed slightly from the proposed regulation in order to improve clarity and reduce duplication. The content of the proposed § 328.2 "General Definitions" has been partially combined with § 328.3 "Definitions." The remainder has been reestablished as § 328.5, "Changes in Limits of Waters of the United States." Section 328.2 has been established as "General Scope." The proposed §§ 328.4 and 328.5 have been combined into § 328.4 and renamed "Limits of Jurisdiction."

A number of commenters appeared to have misinterpreted the intent of this part. Many thought we were trying to reduce the scope of jurisdiction while others believed we were trying to expand the scope of jurisdiction. Neither is the case. The purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted.

*Section 328.3: Definitions.* This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

The term "navigable waters of the United States" has not been added to this section since it is defined in Part 329.

A number of comments were received concerning the proposed change to the definition of the terms "adjacent" and the proposed definitions for the terms "inundation", "saturated", "prevalence", and "typically adapted." A number of commenters believed that these terms may better define the scope of jurisdiction of the section 404 program, but such definitions should more rightfully be within the province of the Environmental Protection Agency in order to remain consistent with the opinion of Benjamin Civiletti, Attorney General (September 5, 1979). These definitions would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time.

To respond to requests for clarification, we have added a definition for "tidal waters." The definition is consistent with the way the Corps has traditionally interpreted the term.

*Section 328.4: Limits of Jurisdiction.* Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark, provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.

*Section 328.5: Changes in Limits of Waters of the United States.* This section was changed to reflect both natural and man-made changes to the limits of waters of the United States. This change was made for clarification and resulted from consultation with the Environmental Protection Agency.

*Section 328.6: Supplemental Clarification.* Most commenters favored the Corps plans to give special consideration to unique areas such as Arctic Tundra that do not easily fit the generic" wetlands definition. Several commenters indicated that the Corps should clarify its intended use of this section, and one questioned the need to "describe" unique areas in the Federal Register. A number of commenters indicated that criteria should be specified for determining wetland types to be included as unique areas. Some commenters stated that close coordination between the Corps and the Environmental Protection Agency will be necessary when selecting unique areas and developing procedures for making wetland determinations in such areas, since the Environmental Protection Agency has the final authority to determine the scope of "Waters of the United States."

While we believe that supplemental clarificaion of unique areas will be a positive step in clarifying the scope of jurisdiction under the section 404 permit program, we have determined that such supplemental clarification can be done under existing regulations of the Environmental Protection Agency and the Corps and therefore have deleted this section.

Part 329—Definition of Navigable Waters of the United States

We are currently planning to propose a complete revision of Part 329 in the near future, to simplify and clarify the procedures involved, while retaining the essential aspects of the relevant policy. In the interim, we are making the two minor changes discussed below.

*Section 329.11:* This section has been modified to clarify that the lateral extent of jurisdiction in rivers and lakes extends to the edge of all such waterbodies as it does in bays and estuaries (§ 329.12(b)).

*Section 329.12(a):* This section has been corrected to reflect that the territorial seas, for the purpose of Rivers and Harbors Act of 1899 jurisdiction, extend 3 geographic miles everywhere and are measured from the baseline.

Part 330—Nationwide Permits

We are reissuing the 26 nationwide permits at § 330.5(a) as modified and conditioned. The nationwide permits will be in effect for 5 years beginning with the effective date of this regulation, unless sooner revised or revoked.

*Section 330.1:* This section was restructured and updated in order to improve its readability and technical accuracy. The definition concerning the division engineer's discretionary authority was deleted from this section since similar language appears in § 330.2. "Definitions." The discussion concerning the applicability of nationwide permits as they relate to

other Federal, state, and local authorizations was deleted from this section and relocated to § 330.5(d) "Further Information."

*Section 330.2:* The definition of the term "headwaters" was deleted from Part 323 and relocated to § 330.2(b), since the definition is used as part of the nationwide permit program. The definition of the term "natural lake" which was proposed at § 330.2(c) has been deleted. Changes to the "headwaters"/"isolated waters" nationwide permit which is found at § 330.5(a)(26) have obviated the need for this definition.

*Section 330.5:* In order to better inform the public of the statutory authority under which each nationwide permit has been issued, we have added the authority by parenthetical expression at the end of each nationwide permit.

We had proposed nationwide permits for activities funded or authorized by another Federal agency or department and for activities adjacent to Corps of Engineers civil works projects. Most commenters discussed the two proposed nationwide permits together. The most frequent comments questioned whether they would comply with section 404(e) of the CWA. They believed these nationwide permits could authorize a wide variety of Federal projects that would not be similar in nature and projects which could have significant adverse environmental inpacts on aquatic resources. Numerous commenters stated that the Corps would be delegating its 404(b)(1) compliance responsibilities to other agencies and that there is a natural tendency of such agencies to be self-serving. Many commenters, including some states, objected that the public and other agencies would not have an opportunity to review some large individual projects. Many commenters encouraged the adoption of these nationwide permits; in most cases they based their opinion upon reduction in duplication and the expediting of project authorization. Based on the comments received we have decided that clarification of activities that could be covered by nationwide permits would be necessary to insure proper understanding and field application. Because of the complexity of doing this and an evaluation of the comments received, we have decided not to adopt these two nationwide permits.

*Section 330.5(a)(3):* This nationwide permit for repair, rehabilitation, or replacement of existing structures or fill has been clarified to show that beach restoration is not authorized by this nationwide permit.

*Section 330.5(a)(6):* This nationwide permit for survey activities was clarified to show that it does not authorize the drilling of exploration-type bore holes for oil and gas exploration.

*Section 330:5(a)(7):* This nationwide permit for outfall structures was clarified by adding language concerning minor excavation, filling and other work which is routinely associated with the installation of intake and outfall structures.

*Section 330.5(a)(18):* This nationwide permit for discharges up to 10 cubic yards was clarified by indicating that it does not authorize discharges for the purpose of stream diversion. The footnote was deleted because it was redundant with the terms of the nationwide permit itself.

*Section 330.5(a)(19):* This nationwide permit for dredging up to 10 cubic yards was clarified by indicating that it does not authorize the connection of canals or other artificial waterways to navigable waters of the United States.

*Section 330.5(a)(22):* This nationwide permit for the removal of obstructions to navigation was clarified by indicating that it does not authorize maintenance dredging, shoal removal, or riverbank snagging.

*Section 330.5(b)(3):* This condition for the protection of endangered species was modified to set forth more clearly options available to the district engineer to satisfy section 7 of the Endangered Species Act when it has been determined that an activity may adversely affect any listed endangered species or its critical habitat.

*Section 330.5(b)(7):* This condition for the protection of wild and scenic rivers was modified to define more clearly components of the National Wild and Scenic River System by showing that it includes any Congressionally designated "study river."

*Section 330.5(b)(9):* This condition for the protection of historic properties was added in response to numerous comments which expressed concern for an apparent lack of consideration which was being given historic properties. This condition outlines the procedures to be followed by both the permittee and the district engineer to provide for modification, suspension, or revocation of a nationwide permit or contact with the Advisory Council on Historic Preservation if an activity authorized by a nationwide permit may adversely affect an historic property.

*Section 330.5(b)(10):* This condition was added as a result of comments which expressed concern that activities performed under the nationwide permits could impair reserved tribal rights.

*Section 330.5(b) (11) and (12):* These conditions were adopted as proposed. They provide notification to the public that, within certain states, authorization for the activity may have been denied without prejudice as a result of state 401 water quality certification denial or nonconcurrence with Coastal Zone Management consistency. These conditions trigger the provisions of §§ 330.9 and 330.10.

*Section 330.5(b)(13):* This condition was added to alert the public that regional conditions may have been added by the division engineer in accordance with § 330.8(a).

*Section 330.5(c):* The Grandfathering provision included in the October 5, 1984, final regulations expires on April 5, 1986, before the effective date of these regulations and is, therefore, no longer needed and has been deleted. A new paragraph has been added to provide the public further information on nationwide permits as they relate to such things as compliance with conditions, other required authorizations, property rights, Federal projects, and revised or modified water quality standards.

*Section 330.5(d):* This paragraph has been added to clarify that the Chief of Engineers has the authority to modify, suspend, or revoke any nationwide permit.

Some states indicated in their comments that there might be other ways to reduce burdens on the public within their state other than the nationwide permits. One state suggested that it might be appropriate to revoke all the nationwide permits in favor of regional permits subject to interagency review. The authority exists for the Chief of Engineers to revoke some or all of the nationwide permits within a state. There are also existing provisions in the regulations for district engineers and the states to develop a permit system designed around specific state authorities. These existing provisions include regional general permits, programmatic general permits, transfer of the 404 program (see 33 CFR 323.5), joint processing, permit consolidation, preapplication consultation and special area management planning. Before adopting a permit system designed around specific state authorities, a public notice providing an opportunity for a public hearing would be issued outlining the proposed permit system within the state and the proposal to revoke the nationwide permits. If such a system is developed, the Chief of Engineers will consider revoking all or most of the nationwide permits within a state.

*Section 330.8(o):* The concept of case-by-case regional conditioning authority received overwhelming support. This new paragraph allows the division engineer through discretionary authority to add activity specific conditions to nationwide permits on a case-by-case basis. The district engineer may do the same when there is mutual agreement with the permittee or when conditions are necessary based on conditions of a state 401 certification.

*Section 330.8(c):* This paragraph was modified to clarify that, although the division engineer has used discretionary authority to require individual permits, he may subsequently allow the activity to be authorized by nationwide permit if the impediment to using the nationwide permit, which triggered the discretionary authority, has been removed.

*Section 330.8(c)(2):* This paragraph has been modified to allow division engineers the discretionary authority to require individual permits for categories of activities or specific geographic areas. This authority was previously exercised by the Chief of Engineers. However, the Chief of Engineers is retaining this authority on a statewide or nationwide basis.

*Section 330.9:* Many commenters objected to the issuance of nationwide permits when a state denies 401 certification. Their objections were based on the Clean Water Act requirement that "No license or permit shall be granted until the certification . . . has been obtained or has been waived." Commenters expressed strong concerns about the validity of such permits, and stated that issuance would constitute a de facto transfer of the administration of this portion of the 404 permit program to the objecting states. An attendant concern was that, if states were unable to respond within the time specified by the Corps, a waiver would be presumed, and the nationwide permit would become effective, whether or not this would have been the intent of the state. Some commenters suggested that states would be forced to deny certifications because of inadequate time to ensure that proposed activities would not violate water quality standards. Most commenters opposed district engineers having discretionary authority over conditions to the 401 certification. One commenter believes this authority conflicts with states' rights. Another suggested that the proposed action could prod states into adopting their own wetland laws and regulatory programs. Several commenters supported the proposal, stating that it was a means of preserving the utility of the general permit program.

Section 330.9 has been modified to provide that, if a state denies a required 401 certification for a particular nationwide permit, then authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. We did not adopt the 30 day waiver period but rather will rely on the language at § 325.2(b)(1) which defines a reasonable period of time. This section was also modified to notify the public that the district engineer will include conditions of the 401 water quality certification as special conditions of the nationwide permit.

*Section 330.9(b):* This subsection has been added to notify the public of the certification requirements of the various nationwide permits.

*Section 330.10:* A number of coastal states commented that consistency determination or waiver thereof must have been obtained prior to the promulgation of the nationwide permits. Some commenters asserted that such a requirement is not a statutory prerequisite to permit issuance. Others contend that assuming a waiver of certification preempts the individual state's authority and thwarts Congressional intent that the permit process involves oversight by the state as well as Federal agencies.

Section 330.10 has been modified to state that, in certain instances where a state has not concurred that a particular nationwide permit is consistent with its coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has either concurred in that determination or waived its right to do so.

*Section 330.11:* This subsection was added to clarify existing procedures to establish a time limit in which a permittee may rely on confirmation from the district engineer that an activity is covered by a nationwide permit, and to specify procedures to modify, suspend, or revoke the permittee's right to proceed under the nationwide permit after the district engineer notified the permittee that the activity may proceed.

*Section 330.12:* This subsection was modified to provide a twelve month transition period for projects which may be affected by future changes in nationwide permits. After considering equity established in reliance on the nationwide permit and that the public will in all likelihood receive ample notice of proposed changes, we believe that this transition period is both reasonable and equitable. In addition, if necessary on a case-by-case basis we can, even though there is a grandfather provision, exercise discretionary authority pursuant to § 330.8 or modify, suspend or revoke individual authorization pursuant to 33 CFR 325.7.

*State Certification of Nationwide Permits*

Most states have issued or waived 401 certification and/or Coastal Zone Management consistency concurrence for one or more of the twenty six nationwide permits. Many states have issued a conditional certification and some have denied certification/consistency concurrence. Final action is still pending in some of the states but is imminent. The primary mechanism for keeping the public informed of the status and/or changes in state certifications or Coastal Zone Management consistency concurrence will be public notices issued by the district engineers within the affected states. The district engineers will be issuing public notices concurrent with the publication of these regulations. Subsequent notices will be issued as changes occur.

Listed below are those states which, as of the date of this printing, have either denied or conditionally issued 401 certification and/or coastal zone management consistency concurrence for one or more of the nationwide permits. For more current and detailed information you should consult with the appropriate district engineer.

Alaska, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia and Wisconsin.

Determinations under Executive Order 12291 and the Regulatory Flexibility Act. The Department of the Army has determined that the revisions to these regulations do not contain a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. The Department of the Army certifies, pursuant to section 605(b) of the Regulatory Flexibility Act of 1980, that these regulations will not have a significant economic impact on a substantial number of entities.

Note 1.—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

*33 CFR Part 320*

Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

*33 CFR Part 321*

Dams, Intergovernmental relations, Navigation, Waterways.

*33 CFR Part 322*

Continental shelf, Electric power, Navigation, Water pollution control, Waterways.

*33 CFR Part 323*

Navigation, Water pollution control, Waterways.

*33 CFR Part 324*

Water pollution control.

*33 CFR Part 325*

Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

*33 CFR Part 326*

Investigations, Intergovernmental relations, Law enforcement, Navigation, Water pollution control, Waterways.

*33 CFR Part 327*

Administrative practice and procedure, Navigation, Water pollution control, Waterways.

*33 CFR Part 328*

Navigation, Water pollution control, Waterways.

*33 CFR Part 329*

Waterways.

*33 CFR Part 330*

Navigation, Water pollution control, Waterways.

Dated: November 4, 1986.

**Robert K. Dawson,**

*Assistant Secretary of the Army (Civil Works).*

Accordingly, the Department of the Army is revising 33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 329, and 330 and adding Part 328 to read as follows:

## PART 320—GENERAL REGULATORY POLICIES

Sec.



Authority: 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

### § 320.1 Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.* (1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers. If a district or division engineer makes a final decision on a permit application in accordance with the procedures and authorities contained in these regulations (33 CFR Parts 320–330), there is no administrative appeal of that decision.

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CFR Parts 325 and 330 is the primary method of eliminating unnecessary federal control over activities which do not justify individual control or which are adequately regulated by another agency.

(4) The Corps is neither a proponent nor opponent of any permit proposal. However, the Corps believes that applicants are due a timely decision. Reducing unnecessary paperwork and delays is a continuing Corps goal.

(5) The Corps believes that state and federal regulatory programs should complement rather than duplicate one another. The Corps uses general permits, joint processing procedures, interagency review, coordination, and authority transfers (where authorized by law) to reduce duplication.

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

(b) *Types of activities regulated.* This Part and the Parts that follow (33 CFR Parts 321–330) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army (DA) permits for controlling certain activities in waters of the United States or the oceans. This part identifies the various federal statutes which require that DA permits be issued before these activities can be lawfully undertaken; and related Federal laws and the general policies applicable to the review of those activities. Parts 321–324 and 330 address special policies and procedures applicable to the following specific classes of activities:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of artificial islands, installations, and other devices on the outer continental shelf (Part 322);

(5) Discharges of dredged or fill material into waters of the United States (Part 323);

(6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters (Part 324); and

(7) Nationwide general permits for certain categories of activities (Part 330).

(c) *Forms of authorization.* DA permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of individual applications and general permits that authorize a category or categories of activities in specific geographical regions or nationwide. The term "general permit" as used in these regulations (33 CFR Parts 320–330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits which are issued by the Chief of Engineers through publication in the Federal Register and are applicable throughout the nation. The nationwide permits are found in 33 CFR Part 330. If an activity is covered by a general permit, an application for a DA permit

does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a DA permit. In certain cases pre-notification may be required before initiating construction. (See 33 CFR 330.7)

(d) *General instructions.* General policies for evaluating permit applications are found in this part. Special policies that relate to particular activities are found in Parts 321 through 324. The procedures for processing individual permits and general permits are contained in 33 CFR Part 325. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. "Navigable waters of the United States" are defined in 33 CFR Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899. "Waters of the United States" are defined in 33 CFR Part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act.

**§ 320.2 Authorities to issue permits.**

(a) Section 9 of the Rivers and Harbors Act, approved March 3, 1899 (33 U.S.C. 401) (hereinafter referred to as section 9), prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit (See 33 CFR Part 321.) Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (49 U.S.C. 1155g(6)(A)). A DA permit pursuant to section 404 of the Clean Water Act is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways. (See 33 CFR Part 323.)

(b) Section 10 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 403) (hereinafter referred to as section 10), prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. The authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, by section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See 33 CFR Part 322.)

(c) Section 11 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 404), authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads, or other works may be extended or deposits made without approval of the Secretary of the Army. Effective May 27, 1970, permits for work shoreward of those lines must be obtained in accordance with section 10 and, if applicable, section 404 of the Clean Water Act (see § 320.4(o) of this Part).

(d) Section 13 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 407), provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency (EPA), and the states under sections 402 and 405 of the Clean Water Act, (33 U.S.C. 1342 and 1345). (See 40 CFR Parts 124 and 125.)

(e) Section 14 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 408), provides that the Secretary of the Army, on the recommendation of the Chief of Engineers, may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. (See 33 CFR Part 323.) The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army and published in 40 CFR Part 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers shall consider the economic impact on navigation and anchorage of such a prohibition in reaching his decision. Furthermore, the Administrator can deny, prohibit, restrict or withdraw the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. (See 40 CFR Part 230).

(g) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for the purpose of disposal in the ocean where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of the EPA in consultation with the Secretary of the Army and published in 40 CFR Parts 220–229. However, similar to the EPA Administrator's limiting authority cited in paragraph (f) of this section, the Administrator can prevent the issuance of a permit under this authority if he

finds that the disposal of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas. (See 33 CFR Part 324).

**§ 320.3 Related laws.**

(a) Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any applicant for a federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or would originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1456(c)), requires federal agencies conducting activities, including development projects, directly affecting a state's coastal zone, to comply to the maximum extent practicable with an approved state coastal zone management program. Indian tribes doing work on federal lands will be treated as a federal agency for the purpose of the Coastal Zone Management Act. The Act also requires any non-federal applicant for a federal license or permit to conduct an activity affecting land or water uses in the state's coastal zone to furnish a certification that the proposed activity will comply with the state's coastal zone management program. Generally, no permit will be issued until the state has concurred with the non-federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the state's coastal zone management program. (See 15 CFR Part 930.)

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1432), authorizes the Secretary of Commerce, after consultation with other interested federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters, of the Great Lakes and their connecting waters, or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations * * *". (See Appendix B of 33 CFR Part 325.)

(e) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, *et seq.*), the Migratory Marine Game-Fish Act (16 U.S.C. 760c–760g), the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c) and other acts express the will of Congress to protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, and with the head of the appropriate state agency exercising administration over the wildlife resources of the affected state.

(f) The Federal Power Act of 1920 (16 U.S.C. 791a *et seq.*), as amended, authorizes the Federal Energy Regulatory Agency (FERC) to issue licenses for the construction and the operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydro-power project. However, where such structures will affect the navigable capacity of any navigable water of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a DA recommendation to FERC for the inclusion of appropriate provisions in the FERC license rather than the issuance of a separate DA permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction and the operation and maintenance of physical structures licensed by FERC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *et seq.* remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of disposal in ocean waters, section 404 or section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for such listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 *et seq.*), which amends the Act of June 27, 1960. By this Act, whenever a federal construction project or federally licensed project, activity, or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project.

(h) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires DA authorization, the property report is required by Housing and Urban Development regulation to state whether

or not a permit for the development has been applied for, issued, or denied by the Corps of Engineers under section 10 or section 404. The property report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act (16 U.S.C. 1531 *et seq.*) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act requires that federal agencies, in consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, use their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized, funded, or carried out by the Agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical. (See 50 CFR Part 17 and 50 CFR Part 402.)

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for section 10, section 404 and section 103 permits which may also be required pursuant to the authorities listed in section 320.2 and the policies specified in section 320.4 of this Part.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act.

(l) Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 *et seq.*) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.

(m) The Ocean Thermal Energy Conversion Act of 1980, (42 U.S.C. section 9101 *et seq.*) establishes a licensing regime administered by the Administrator of NOAA for the ownership, construction, location, and operation of ocean thermal energy conversion (OTEC) facilities and plantships. An application for an OTEC license filed with the Administrator constitutes an application for all federal authorizations required for ownership, construction, location, and operation of an OTEC facility or plantship, except for certain activities within the jurisdiction of the Coast Guard. This includes applications for section 10, section 404, section 103 and other DA authorizations which may be required.

(n) Section 402 of the Clean Water Act authorizes EPA to issue permits under procedures established to implement the National Pollutant Discharge Elimination System (NPDES) program. The administration of this program can be, and in most cases has been, delegated to individual states. Section 402(b)(6) states that no NPDES permit will be issued if the Chief of Engineers, acting for the Secretary of the Army and after consulting with the U.S. Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

(o) The National Fishing Enhancement Act of 1984 (Pub. L. 98-623) provides for the development of a National Artificial Reef Plan to promote and facilitate responsible and effective efforts to establish artificial reefs. The Act establishes procedures to be followed by the Corps in issuing DA permits for artificial reefs. The Act also establishes the liability of the permittee and the United States. The Act further creates a civil penalty for violation of any provision of a permit issued for an artificial reef.

### § 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for DA permits. Additional policies specifically applicable to certain types of activities are identified in 33 CFR Parts 321–324.

(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work:

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

(3) The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise.

(b) *Effect on wetlands.* (1) Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. For projects to be undertaken or partially or entirely funded by a federal, state, or local agency, additional requirements on wetlands considerations are stated in Executive Order 11990, dated 24 May 1977.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;

(vii) Wetlands which serve significant water purification functions; and

(viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

(3) Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area. In addition, the district engineer may undertake, where appropriate, reviews of particular wetland areas in consultation with the Regional Director of the U. S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate state agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) of this section or because of provisions of paragraph (b)(3), of this section unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR Part 230. 10(a) (1), (2), (3)).

(5) In addition to the policies expressed in this subpart, the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90-454, and state regulatory laws or programs for classification and protection of wetlands will be considered.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this section) district engineers will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. The Army will give full consideration to the views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits.

(d) *Water quality.* Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

(e) *Historic, cultural, scenic, and recreational values.* Applications for DA permits may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties and National Landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar federal controls or policies. Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

(f) *Effects on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. Generally, the coast line or base line is the line of ordinary low water on

the mainland; however, there are exceptions where there are islands or lowtide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and *United States* v. *California*, 381 U.S.C. 139 (1965), 382 U.S. 448 (1966)). Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, DC 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the administrative record of the application. After completion of standard processing procedures, the record will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Consideration of property ownership.* Authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) An inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.

(2) Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appears contrary to the public interest, the district engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources.

(3) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(4) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized federal project, the applicant should be apprised in writing of the fact and of the possibility that a federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the Rivers and Harbors Act of 1899 or by section 404 of the Clean Water Act which may be caused by, or result from, future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes, and no claims or right to compensation will accrue from any such damage.

(5) Proposed activities in the area of a federal project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

(6) A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application. The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision.

(h) *Activities affecting coastal zones.* Applications for DA permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency and Indian tribe applicants for DA permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved state coastal zone management programs.

(i) *Activities in marine sanctuaries.* Applications for DA authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a DA permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the DA permit will normally not be delayed pending action by another Federal, state or local agency (See 33 CFR 325.2 (d)(4)). However, where the required Federal, state and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application, the district engineer will, after considering the likelihood of subsequent approval of the other authorization and/or certification and the time and effort remaining to complete processing the Army permit application, either immediately deny the Army permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, he will conclude by either denying the permit as contrary to the public interest, or denying it without prejudice indicating that except for the other Federal, state or local denial the Army permit could, under appropriate conditions, be issued. Denial without prejudice means that there is no prejudice to the right of the applicant to reinstate processing of the Army permit

application if subsequent approval is received from the appropriate Federal, state and/or local agency on a previously denied authorization and/or certification. Even if official certification and/or authorization is not required by state or federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

(3) A proposed activity may result in conflicting comments from several agencies within the same state. Where a state has not designated a single responsible coordinating agency, district engineers will ask the Governor to express his views or to designate one state agency to represent the official state position in the particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320–324, and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review.

(5) Where general permits to avoid duplication are not practical, district engineers shall develop joint procedures with those local, state, and other Federal agencies having ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for DA permits may be processed jointly with the state or other federal applications to an independent conclusion and decision by the district engineer and the appropriate Federal or state agency. (See 33 CFR 325.2(e).)

(6) The district engineer shall develop operating procedures for establishing official communications with Indian Tribes within the district. The procedures shall provide for appointment of a tribal representative who will receive all pertinent public notices, and respond to such notices with the official tribal position on the proposed activity. This procedure shall apply only to those tribes which accept this option. Any adopted operating procedures shall be distributed by public notice to inform the tribes of this option.

(k) *Safety of impoundment structures.* To insure that all impoundment structures are designed for safety, non-Federal applicants may be required to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons and, in appropriate cases, that the design has been independently reviewed (and modified as the review would indicate) by similarly qualified persons.

(l) Floodplain management. (1) Floodplains possess significant natural values and carry out numerous functions important to the public interest. These include:

(i) Water resources values (natural moderation of floods, water quality maintenance, and groundwater recharge);

(ii) Living resource values (fish, wildlife, and plant resources);

(iii) Cultural resource values (open space, natural beauty, scientific study, outdoor education, and recreation); and

(iv) Cultivated resource values (agriculture, aquaculture, and forestry).

(2) Although a particular alteration to a floodplain may constitute a minor change, the cumulative impact of such changes may result in a significant degradation of floodplain values and functions and in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order 11988, district engineers, as part of their public interest review, should avoid to the extent practicable, long and short term significant adverse impacts associated with the occupancy and modification of floodplains, as well as the direct and indirect support of floodplain development whenever there is a practicable alternative. For those activities which in the public interest must occur in or impact upon floodplains, the district engineer shall ensure, to the maximum extent practicable, that the impacts of potential flooding on human health, safety, and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains are restored and preserved.

(3) In accordance with Executive Order 11988, the district engineer should avoid authorizing floodplain developments whenever practicable alternatives exist outside the floodplain. If there are no such practicable alternatives, the district engineer shall consider, as a means of mitigation, alternatives within the floodplain which will lessen any significant adverse impact to the floodplain.

(m) *Water supply and conservation.* Water is an essential resource, basic to human survival, economic growth, and the natural environment. Water conservation requires the efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. Actions affecting water quantities are subject to Congressional policy as stated in section 101(g) of the Clean Water Act which provides that the authority of states to allocate water quantities shall not be superseded, abrogated, or otherwise impaired.

(n) *Energy conservation and development.* Energy conservation and development are major national objectives. District engineers will give high priority to the processing of permit actions involving energy projects.

(o) *Navigation.* (1) Section 11 of the Rivers and Harbors Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on 27 May 1970 (33 CFR 209.150) which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications

would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to 27 May 1970 do not require specific authorization.

(2) The policy of considering harbor lines as guidance for assessing impacts on navigation continues.

(3) Protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government.

(4) District engineers should protect navigational and anchorage interests in connection with the NPDES program by recommending to EPA or to the state, if the program has been delegated, that a permit be denied unless appropriate conditions can be included to avoid any substantial impairment of navigation and anchorage.

(p) *Environmental benefits.* Some activities that require Department of the Army permits result in beneficial effects to the quality of the environment. The district engineer will weigh these benefits as well as environmental detriments along with other factors of the public interest.

(q) *Economics.* When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values. Many projects also contribute to the National Economic Development (NED), (i.e., the increase in the net value of the national output of goods and services).

(r) *Mitigation.*[1] (1) Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location. Mitigation requirements generally fall into three categories.

(i) Project modifications to minimize adverse project impacts should be discussed with the applicant at pre-application meetings and during application processing. As a result of these discussions and as the district engineer's evaluation proceeds, the district engineer may require minor project modifications. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need. Such modifications can include reductions in scope and size; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed. For example, erosion control features could be required on a fill project to reduce sedimentation impacts or a pier could be reoriented to minimize navigational problems even though those projects may satisfy all legal requirements (paragraph (r)(1)(ii) of this section) and the public interest review test (paragraph (r)(1)(iii) of this section) without such modifications.

(ii) Further mitigation measures may be required to satisfy legal requirements. For Section 404 applications, mitigation shall be required to ensure that the project complies with the 404(b)(1) Guidelines. Some mitigation measures are enumerated at 40 CFR 230.70 through 40 CFR 230.77 (Subpart H of the 404(b)(1) Guidelines).

(iii) Mitigation measures in addition to those under paragraphs (r)(1) (i) and (ii) of this section may be required as a result of the public interest review process. (See 33 CFR 325.4(a).) Mitigation should be developed and incorporated within the public interest review process to the extent that the mitigation is found by the district engineer to be reasonable and justified. Only those measures required to ensure that the project is not contrary to the public interest may be required under this subparagraph.

(2) All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. District engineers will require all forms of mitigation, including compensatory mitigation, only as provided in paragraphs (r)(1) (i) through (iii) of this section. Additional mitigation may be added at the applicants' request.

[1] This is a general statement of mitigation policy which applies to all Corps of Engineers regulatory authorities covered by these regulations (33 CFR Parts 320–330). It is not a substitute for the mitigation requirements necessary to ensure that a permit action under section 404 of the Clean Water Act complies with the section 404(b)(1) Guidelines. There is currently an interagency Working Group formed to develop guidance on implementing mitigation requirements of the Guidelines.

## PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.
321.1 General.
321.2 Definitions.
321.3 Special policies and procedures.

**Authority:** 33 U.S.C. 401.

### § 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require DA permits under section 404 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for DA permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of section 404.

### § 321.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dike or dam" means, for the purposes of section 9, any impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce. The term does not include a weir. Weirs are regulated pursuant to section 10 of the Rivers and Harbors Act of 1899. (See 33 CFR Part 322.)

**§ 321.3 Special policies and procedures.**

The following additional special policies and procedures shall be applicable to the evaluation of permit applications under this regulation:

(a) The Assistant Secretary of the Army (Civil Works) will decide whether DA authorization for a dam or dike in an interstate navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the district engineer when forwarding the report to the Assistant Secretary of the Army (Civil Works), through the Chief of Engineers.

(b) District engineers are authorized to decide whether DA authorization for a dam or dike in an intrastate navigable water of the United States will be issued (see 33 CFR 325.8).

(c) Processing a DA application under section 9 will not be completed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate state legislature has been obtained if the navigable water of the United States is an intrastate waterbody (i.e., the navigable portion of the navigable water of the United States is solely within the boundaries of one state). The district engineer, upon receipt of such an application, will notify the applicant that the consent of Congress or the state legislature must be obtained before a permit can be issued.

## PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.



Authority: 33 U.S.C. 403.

**§ 322.1 General.**

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) (hereinafter referred to as section 10). See 33 CFR 320.2(b). Certain structures or work in or affecting navigable waters of the United States are also regulated under other authorities of the DA. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A DA permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

**§ 322.2 Definitions.**

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 329. Generally, they are those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.

(b) The term "structure" shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.2(e).

(e) The term "individual permit" means a DA authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR Part 325, and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320.

(f) The term "general permit" means a DA authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

(g) The term "artificial reef" means a structure which is constructed or placed in the navigable waters of the United States or in the waters overlying the outer continental shelf for the purpose of enhancing fishery resources and commercial and recreational fishing opportunities. The term does not include activities or structures such as wing deflectors, bank stabilization, grade stabilization structures, or low flow key ways, all of which may be useful to enhance fisheries resources.

**§ 322.3 Activities requiring permits.**

(a) *General.* DA permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States except as otherwise provided in § 322.4 below. Certain activities specified in 33 CFR Part 330 are permitted by that regulation ("nationwide general permits"). Other activities may be authorized by district or division engineers on a regional basis ("regional general permits"). If an activity is not exempted by section 322.4 of this part or authorized by a general permit, an individual section 10 permit will be required for the proposed activity. Structures or work are in navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) of this section, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity. For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

(b) *Outer continental shelf.* DA permits are required for the construction

of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf, pursuant to section 4(f) of the Outer Continental Shelf Lands Act as amended. (See 33 CFR 320.2(b).)

(c) *Activities of Federal agencies.* (1) Except as specifically provided in this paragraph, activities of the type described in paragraphs (a) and (b) of this section, done by or on behalf of any Federal agency are subject to the authorization procedures of these regulations. Work or structures in or affecting navigable waters of the United States that are part of the civil works activities of the Corps of Engineers, unless covered by a nationwide or regional general permit issued pursuant to these regulations, are subject to the procedures of separate regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and district engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(2) Congress has delegated to the Secretary of the Army in section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States, upon recommendation of the Chief of Engineers. The general legislation by which Federal agencies are enpowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of section 10. If an agency asserts that it has Congressional authorization meeting the test of section 10 or would otherwise be exempt from the provisions of section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(3) The policy provisions set out in 33 CFR 320.4(j) relating to state or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy, e.g., section 313 and section 401 of the Clean Water Act.

**§ 322.4 Activities not requiring permits.**

(a) Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR 320.4(o)) do not require section 10 permits; however, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972, a section 404 permit is required. (See 33 CFR Part 323.)

(b) Pursuant to section 154 of the Water Resource Development Act of 1976 (Pub. L. 94-587), Department of the Army permits are not required under section 10 to construct wharves and piers in any waterbody, located entirely within one state, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce.

**§ 322.5 Special policies.**

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 10 permits. The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* DA permits are required for structures or work in or affecting navigable waters of the United States. However, certain structures or work specified in 33 CFR Part 330 are permitted by that regulation. If a structure or work is not permitted by that regulation, an individual or regional section 10 permit will be required.

(b) *Artificial Reefs.* (1) When considering an application for an artificial reef, as defined in 33 CFR 322.2(g), the district engineer will review the applicant's provisions for siting, constructing, monitoring, operating, maintaining, and managing the proposed artificial reef and shall determine if those provisions are consistent with the following standards:

(i) The enhancement of fishery resources to the maximum extent practicable;

(ii) The facilitation of access and utilization by United States recreational and commercial fishermen;

(iii) The minimization of conflicts among competing uses of the navigable waters or waters overlying the outer continental shelf and of the resources in such waters;

(iv) The minimization of environmental risks and risks to personal health and property;

(v) Generally accepted principles of international law; and

(vi) the prevention of any unreasonable obstructions to navigation. If the district engineer decides that the applicant's provisions are not consistent with these standards, he shall deny the permit. If the district engineer decides that the provisions are consistent with these standards, and if he decides to issue the permit after the public interest review, he shall make the provisions part of the permit.

(2) In addition, the district engineer will consider the National Artificial Reef Plan developed pursuant to section 204 of the National Fishing Enhancement Act of 1984, and if he decides to issue the permit, will notify the Secretary of Commerce of any need to deviate from that plan.

(3) The district engineer will comply with all coordination provisions required by a written agreement between the DOD and the Federal agencies relative to artificial reefs. In addition, if the district engineer decides that further consultation beyond the normal public commenting process is required to evaluate fully the proposed artificial reef, he may initiate such consultation with any Federal agency, state or local government, or other interested party.

(4) The district engineer will issue a permit for the proposed artificial reef only if the applicant demonstrates, to the district engineer's satisfaction, that the title to the artificial reef construction material is unambiguous, that responsibility for maintenance of the reef is clearly established, and that he has the financial ability to assume liability for all damages that may arise with respect to the proposed artificial reef. A demonstration of financial responsibility might include evidence of insurance, sponsorship, or available assets.

(i) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall not be liable for damages caused by activities required to be undertaken under any terms and conditions of the permit, if the permittee is in compliance with such terms and conditions.

(ii) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall be liable, to the extent determined under applicable law, for damages to which paragraph (i) does not apply.

(iii) Any person who has transferred title to artificial reef construction materials to a person to whom a permit is issued in accordance with these regulations shall not be liable for damages arising from the use of such materials in an artificial reef, if such materials meet applicable requirements

of the plan published under section 204 of the National Artificial Reef Plan, and are not otherwise defective at the time title is transferred.

(c) *Non-Federal dredging for navigation.* (1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging access channels to docks and berthing facilities or deepening such channels to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, state, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with these regulations. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will be accorded to the fullest extent possible to both Federal and non-Federal operations. Permits for non-Federal dredging operations will normally contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation may also authorize the periodic maintenance dredging of the project. Authorization procedures and limitations for maintenance dredging shall be as prescribed in 33 CFR 325.6(e). The permit will require the permittee to give advance notice to the district engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* (1) In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District engineers will inform applicants of the hazards involved and encourage safety in location, design, and operation. District engineers will encourage cooperative or group use facilities in lieu of individual proprietary use facilities.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a resource manager are normally subject to permit authorities cited in § 322.3, of this section, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake resource manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the Rivers and Harbors Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of its control of marking, lighting and standardization of such navigation aids. A Section 10 nationwide permit has been issued for such aids provided they are approved by, and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR 330.5(a)(1)). Electrical service cables to such aids are not included in the nationwide permit (an individual or regional Section 10 permit will be required).

(f) *Outer continental shelf.* Artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, are subject to the standard permit procedures of this regulation. Where the islands, installations and other devices are to be constructed on lands which are under mineral lease from the Mineral Management Service, Department of the Interior, that agency, in cooperation with other federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, of this Part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of these regulations. For all other canals, the exercise of regulatory authority is restricted to those activities which affect the course, location, condition, or capacity of the navigable waters of the United States. The district engineer will consider, for applications for canal work, a proposed plan of the entire development and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal.

(h) *Facilities at the borders of the United States.* (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural

gas to or from a foreign country, must be made to the Secretary of Energy. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), as amended by Executive Order 12038, February 3, 1978, and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766).

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways, and similar facilities for the transportation of persons and/or things, to or from a foreign country. (Executive Order 11423, August 16, 1968).

(5) A DA permit under section 10 of the Rivers and Harbors Act of 1899 is also required for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has been issued as provided above, the district engineer, in evaluating the general public interest, may consider the basic existence and operation of the facility to have been primarily examined and permitted as provided by the Executive Orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate DA authorizations under section 404 of the Clean Water Act or under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, are also required. (See 33 CFR Parts 323 and 324.)

(i) *Power transmission lines.* (1) Permits under section 10 of the Rivers and Harbors Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Department of Energy under the Federal Power Act of 1920. If an application is received for a permit for lines which are part of such a water power project, the applicant will be instructed to submit the application to the Department of Energy. If the lines are not part of such a water power project, the application will be processed in accordance with the procedures of these regulations.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outlined in the National Electrical Safety Code.

| Nominal system voltage, kV | Minimum additional clearance (feet) above clearance required for bridges |
|---|---|
| 115 and below | 20 |
| 138 | 22 |
| 161 | 24 |
| 230 | 26 |
| 350 | 30 |
| 500 | 35 |
| 700 | 42 |
| 750-765 | 45 |

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(4) Corps of Engineer regulation ER 1110-2-4401 prescribes minimum vertical clearances for power and communication lines over Corps lake projects. In instances where both this regulation and ER 1110-2-4401 apply, the greater minimum clearance is required.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require DA permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, district engineer, and other interested parties as to the effects of the proposal on the use of airspace. The district engineer will, therefore, refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to its recommendations when evaluating the general public interest.

(3) If the seaplane base would serve air carriers licensed by the Department of Transportation, the applicant must receive an airport operating certificate from the FAA. That certificate reflects a determination and conditions relating to the installation, operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the district engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(4) For regulations pertaining to seaplane landings at Corps of Engineers projects, see 36 CFR 327.4.

(k) *Foreign trade zones.* The Foreign Trade Zones Act (48 Stat. 998-1003, 19 U.S.C. 81a to 81u, as anended) authorizes the establishnent of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published at Title 15 of the Code of Federal Regulations, Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the district engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of these regulations. Evaluation by a district engineer of a permit application may give recognition to the consideration by the Board of the general econonic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

(l) *Shipping safety fairways and anchorage areas.* DA permits are required for structures located within shipping safety fairways and anchorage areas established by the U.S. Coast Guard.

(1) The Department of the Army will grant no permits for the erection of structures in areas designated as fairways, except that district engineers may permit temporary anchors and attendant cables or chains for floating or semisubmersible drilling rigs to be placed within a fairway provided the following conditions are met:

(i) The installation of anchors to stabilize semisubmersible drilling rigs within fairways must be temporary and shall be allowed to remain only 120 days. This period may be extended by the district engineer provided reasonable cause for such extension can

be shown and the extension is otherwise justified.

(ii) Drilling rigs must be at least 500 feet from any fairway boundary or whatever distance necessary to insure that minimnum clearance over an anchor line within a fairway will be 125 feet.

(iii) No anchor buoys or floats or related rigging will be allowed on the surface of the water or to a depth of 125 feet from the surface, within the fairway.

(iv) Drilling rigs may not be placed closer than 2 nautical miles of any other drilling rig situated along a fairway boundary, and not closer than 3 nautical miles to any drilling rig located on the opposite side of the fairway.

(v) The permittee must notify the district engineer, Bureau of Land Management, Mineral Management Service, U.S. Coast Guard, National Oceanic and Atmospheric Administration and the U.S. Navy Hydrographic Office of the approximate dates (commencenent and completion) the anchors will be in place to insure maximum notification to mariners.

(vi) Navigation aids or danger markings must be installed as required by the U.S. Coast Guard.

(2) District engineers may grant permits for the erection of structures within an area designated as an anchorage area, but the number of structures will be limited by spacing, as follows: The center of a structure to be erected shall be not less than two (2) nautical miles from the center of any existing structure. In a drilling or production complex, associated structures shall be as close together as practicable having due consideration for the safety factors involved. A complex of associated structures, when connected by walkways, shall be considered one structure for the purpose of spacing. A vessel fixed in place by moorings and used in conjunction with the associated structures of a drilling or production complex, shall be considered an attendant vessel and its extent shall include its moorings. When a drilling or production complex includes an attendant vessel and the complex extends more than five hundred (500) yards from the center or the complex, a structure to be erected shall be not closer than two (2) nautical miles from the near outer limit of the complex. An underwater completion installation in and anchorage area shall be considered a structure and shall be marked with a lighted buoy as approved by the United States Coast Guard.

## PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.



Authority: 33 U.S.C. 1344.

### § 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for DA permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) (hereinafter referred to as section 404). (See 33 CFR 320.2(g).) Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A DA permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

### § 323.2 Definitions.

For the purpose of this part, the following terms are defined:

(a) The term "waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 328.

(b) The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(c) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(d) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). The term does not include *de minimis*, incidental soil movement occurring during normal dredging operations.

(e) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.

(f) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities,

intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms).

(g) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(h) The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

**§ 323.3 Discharges requiring permits.**

(a) *General.* Except as provided in § 323.4 of this Part, DA permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"). If a discharge of dredged or fill material is not exempted by § 323.4 of this Part or permitted by 33 CFR Part 330, an individual or regional section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

(b) *Activities of Federal agencies.* Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR Part 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in expediting the processing of their applications.

**§ 323.4 Discharges not requiring permits.**

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii) (A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(*1*) Minor Drainage means:

(*i*) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidential to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(*ii*) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(*iii*) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs (a)(1)(iii)(C)(*1*) (*ii*) and (*iii*) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.)

(*iv*) The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

*(2)* Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition,

minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a state has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR Part 233.22(i), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1)–(6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)–(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a

**{In Archive} RE: follow-up on EPA briefing**
**Swager, Curtis (Alexander)** to: Denis Borum 06/02/2009 05:44 PM

From: "Swager, Curtis (Alexander)" <Curtis_Swager@alexander.senate.gov>
To: Denis Borum/DC/USEPA/US@EPA,
Archive: This message is being viewed in an archive.

Denis,

I appreciate your speedy response and for digging this up for me.

Thanks, Curtis

Curtis Swager
U.S. Senator Lamar Alexander
Dirksen RM 455
(202)-224-4944

-----Original Message-----
From: Borum.Denis@epamail.epa.gov [mailto:Borum.Denis@epamail.epa.gov]
Sent: Tuesday, June 02, 2009 3:43 PM
To: Swager, Curtis (Alexander)
Subject: RE: follow-up on EPA briefing

Curtis,

Attached is an FR Notice from November 1986. Please see page 41217, bottom of the left hand column. It indicates that non-tidal drainage and irrigation ditches excavated out of uplands are generally not waters of the U.S. EPA further clarified in the EPA/Army Corps "post-Rapanos" guidance that this language means that ditches that drain other waters of the U.S. or connect to waters of the U.S.are generally jurisdictional.

Hope this helps.

Denis

(See attached file: 51FR41205-34.pdf)

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